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No. 95-994

IN THE
Supreme Court of the United States
OCTOBER TERM, 1995

TYSON FOODS, INC. and WLR ACQUISITION CORP.,
Petitioners,

v.

WLR FOODS, INC., *et al.*,
Respondents.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

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PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

In early 1994, petitioners commenced a tender offer for the shares of WLR Foods, Inc., a Virginia corporation. The offer for WLR's shares was an all-cash, non-coercive offer at a substantial premium to the market price. WLR's board of directors rejected the offer and adopted numerous defensive measures available to it under Virginia state law. Petitioners challenged the constitutionality—under the Supremacy and Commerce Clauses of the United States Constitution—of four Virginia statutes that, operating together, enabled WLR's board to block consummation of the offer. The United States District Court for the Western District of Virginia and the United States Court of Appeals for the Fourth Circuit both affirmed the constitutionality of the Virginia state scheme relied on by WLR's board.

The question presented is:

Whether Virginia's statutory scheme designed to combat hostile takeovers of Virginia corporations—a scheme consisting of a control share act, a poison pill act, an affiliated transactions act and a business judgment act (establishing a subjective good faith fiduciary duty standard for a director faced with a hostile tender offer)—is unconstitutional under the Supremacy and Commerce Clauses of the United States Constitution.

LIST OF PARTIES AND RULE 29.1 LIST

In addition to the parties identified in the caption, the following directors of respondent WLR Foods, Inc. were also parties in the district court and court of appeals and are respondents in this action: George W. Bryan, Charles L. Campbell, Stephen W. Custer, Calvin G. Germroth, William H. Groseclose, J. Craig Hott, James L. Keeler, Herman D. Mason, Charles W. Wampler, Jr., and William D. Wampler.

Petitioner Tyson Foods, Inc. has no parent corporation and its non-wholly owned subsidiaries are Trasgo, S.A. de C.V. (Mexico), Offshore Systems, Inc., Aleutian Fuel Services, Ucluelet Seafood Procesors, Ltd., Universal Plan Investments, and Shanghai Ocean Wealth Products Corporation. Petitioner WLR Acquisition Corp. is a wholly-owned subsidiary of Tyson Foods, Inc. and has no subsidiaries.

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PETITION FOR A WRIT OF CERTIORARI

Tyson Foods, Inc. and WLR Acquisition Corp. ("Tyson") respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fourth Circuit in this case.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fourth Circuit (the "Fourth Circuit") is reported at 65 F.3d 1172 (4th Cir. 1995). It is reprinted in the Appendix ("App.") at 1a-32a. The relevant opinions and final judgment of the United States District Court for the Western District of Virginia, Harrisonburg Division (the "District Court") are reprinted at 869 F. Supp. 419 (opinion and final judgment) (App. 33a-48a), 861 F. Supp. 1277 (App. 49a-73a); 857 F. Supp. 492 (App. 74a-79a); and 857 F. Supp. 496 (App. 80a-93a).

JURISDICTION

The Fourth Circuit entered its judgment on September 22, 1995. This Court has jurisdiction to review the judgment by writ of certiorari under 28 U.S.C. § 1254(1). 28 U.S.C. § 2403(b) may apply, and this petition will be served on the Attorney General of Virginia. The District Court, pursuant to 28 U.S.C. § 2403(b), certified to the Attorney General of Virginia on March 11, 1994 that the constitutionality of state statutes were drawn into question in this case.

STATUTORY PROVISIONS INVOLVED

The Supremacy Clause, Art. VI, cl. 2, provides:

> This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

The Commerce Clause, Art. I, § 8, cl. 3, provides:

> The Congress shall have the Power . . . To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes . . . .

The following federal and Virginia statutes are set forth in the Appendix to this petition: (i) The Williams Act amendments to the Securities Exchange Act of 1934 (the "Williams Act"), 15 U.S.C. § 78m(d)-(e), 78n(d)-(f) (App. 94a-102a); (ii) The Virginia Poison Pill Act, Va. Code § 13.1-646 (App. 103a); (iii) The Virginia Business Judgment Act, Va. Code § 13.1-690 (App. 103a-104a); (iv) The Virginia Affiliated Transactions Act, Va. Code § 13.1-725 *et seq.* (App. 104a-116a); and (v) The Virginia Control Share Acquisitions Act (the "Control Share Act"), Va. Code § 13.1-728.1 *et seq.* (App. 116a-127a).

STATEMENT OF THE CASE

This case centers on the claim of Tyson that a Virginia statutory scheme (the "Va. Scheme"), consisting of four statutes, grants to directors of Virginia corporations power to thwart completely a hostile tender offer under the Williams Act. Invoking the powers granted under this unconstitutional scheme, the board of directors of WLR Foods, Inc. ("WLR") blocked Tyson from proceeding with its premium-priced, all-cash tender offer for all of WLR's shares (the "Tyson Offer" or "Offer"). By operating as a total ban on hostile tender offers, that is, tender offers opposed by a target's board, the Va. Scheme (a) conflicts with the purposes of the Williams Act and (b) both discriminates against interstate commerce and creates burdens on interstate commerce that outweigh any permissible local benefits. This result places the Va. Scheme squarely in conflict with the Supremacy and Commerce Clauses of the United States Constitution.

A. The Va. Scheme

The following four statutes, which operating together renders a Virginia corporation invincible against any

hostile (non-board-approved) takeover, constitute the Va. Scheme:

First, Va. Code § 13.1-690 (App. 103a-104a)—the Business Judgment Statute ("§ 690")—was interpreted by the District Court as the sole standard by which the actions of directors in opposing a hostile takeover are evaluated, and limits any evaluation of director action to a determination of whether the directors acted in "good faith" by employing a cosmetically-acceptable "process" in making decisions. App. 76a-77a. The District Court ruled that, no matter how irrational or delusional a director's decision may have been, it is insulated from judicial review as long as made in "good faith." App. 76a. Indeed, under the discovery rulings below, a bidder may not even learn the substance of the advice that the board received in order to determine whether the board has followed or rejected that advice, much less question whether the board's actions were reasonable under the circumstances or whether the board provided complete or accurate information to its advisors.

The Fourth Circuit's ratification of the § 690 standard renders irrelevant the substance of any board deliberations relating to anti-takeover measures adopted by the board. App. 24a. Given these court-approved restrictions on discovery (contrary to federal principles of liberal discovery), the likelihood that a hostile tender offeror could prove that a target company's directors breached their fiduciary duties to shareholders in enacting unjustified anti-takeover measures is virtually nil.[1] As a result, Virginia's fiduciary duty standard is rendered meaningless because it grants a board seeking to entrench itself unfettered discretion to take insurmountable defensive action

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[1] Thus, in sharp contrast to other states (like Delaware) that review defensive takeover tactics with heightened judicial scrutiny (*compare Unocal Corp. v. Mesa Petroleum Co.*, 494 A.2d 946 (Del. 1985)), the decision below virtually eliminates any judicial scrutiny of defensive actions.

in the face of a hostile tender offer—at the direct expense of shareholders. J.A. 2995-96.[2]

Second, Va. Code § 13.1-646 (App. 103a)—the Poison Pill Statute—authorizes Virginia corporations to issue discriminatory rights to shareholders that prevent all takeovers not endorsed in advance by the corporation's directors. While such discriminatory rights plans are typically redeemed upon an indication of shareholder support for a hostile tender offer, the permissive Virginia business judgment standard in § 690 invites directors of Virginia corporations to maintain such plans in place—even in the face of shareholder dissatisfaction—because of the unlikelihood that shareholders or the bidder could ever demonstrate that Virginia directors failed to meet Virginia's permissive fiduciary duty standard.

Third, Va. Code § 13.1-728.1 *et seq.* (App. 116a-127a)—the Control Share Act—strips a bidder's shares of voting rights if the bidder purchases more than 20% of the target's stock, unless a majority of the corporation's shareholders (excluding the bidder and the target corporation's officers, directors who are employees, and their associates) grant voting rights in a control share referendum called for by the bidder. The bidder must acquire 5% of the corporation's shares just to be able to request a control share referendum. Any unvoted but eligible shares count as if affirmatively voted against the bidder's proposal.

Finally, Va. Code § 13.1-725 *et seq.* (App. 104a-116a)—the Affiliated Transactions Act—places strict conditions for three years on the ability of an acquired company to merge with another corporation that holds more than 10% of the acquired company's shares (an "Interested Shareholder") unless the Interested Shareholder first obtains the approval of a majority of the corporation's dis-

[2] Documents from the Joint Appendix filed with the Fourth Circuit in this case are referred to by the page numbers assigned to them in the Joint Appendix, preceded by "J.A."

interested directors, *and* the affirmative vote of two-thirds of shares eligible to vote.

B. Background

Tyson is a large poultry producer based in Springdale, Arkansas, with operations across the United States, including Virginia. J.A. 3006. Its shares trade on the NASDAQ National Market System. J.A. 3006. Tyson has long been interested in merging with an established turkey producer and believes that such a merger would create significant financial benefits for shareholders of both corporations. J.A. 3006-07.

In January 1994, Tyson made its Offer to WLR of $30 per share, a 58% premium over WLR's then-prevailing market price. J.A. 3008. Tyson focused on WLR as an excellent strategic fit due to WLR's substantial turkey production and distribution business and because its shares are publicly traded. J.A. 3006-07. Yet, WLR's chief executive officer immediately spurned Tyson's efforts and later declared in deposition that WLR was "not for sale . . . for any price." J.A. 2194.

At an undocumented meeting of the board of directors of WLR (the "WLR Board" or "Board") on January 20, 1994, the directors simply rubber-stamped management's rejection of the Tyson Offer. Without advice from financial or legal advisors, the WLR Board instructed WLR's management that it should inform Mr. Tyson that "the company is not for sale" at any price. J.A. 2402; 690. The Fourth Circuit described these facts as follows: "The consensus of the Board at the [January 20] meeting was that it preferred for WLR to remain independent *and would reject Tyson's offer.*" App. 3a (emphasis supplied).

Having already rejected Tyson's merger proposal, WLR's management sought to insulate the Board's decision from attack as a breach of fiduciary duty by procuring *ex post facto* "advice." Without involvement of any non-management directors (only one of the ten directors

was arguably an outside director), WLR's *management* interviewed and selected financial and legal advisors, negotiated the terms of their engagement and instructed them on the work to perform and advice to render. *See, e.g.*, J.A. 814-18; 1200; 1578-83; 1787-89; 1196-1201; 2420; 2183-89.

C. Defensive Actions

Acting on the decision it reached at its undocumented meeting, the WLR Board voted at an "official" meeting of the Board on February 4, 1994 to reject the Tyson Offer and adopted numerous defensive measures, as described below. J.A. 4624-34.

1. Sham Resignations

To control the outcome of any referendum held under Virginia's Control Share Act, four WLR officers serving on the WLR Board as directors (the "Four Officers"), who collectively control approximately 16% of WLR's stock, resigned on February 4 as officers in exchange for a package of lifetime health benefits approved by the Board. J.A. 4943-46; 3512-13; 3542. These sham resignations had one purpose: to permit the Four Officers to vote their substantial holdings against the Tyson Offer in a control share referendum. J.A. 611; 4622.

2. Manipulation of the Record Date

The WLR Board, in another manipulative ploy, amended its bylaws to establish a non-customary record date for the control share vote that disenfranchised numerous WLR shareholders. J.A. 4626; 4199. Given that under the Control Share Act non-votes count as votes against a potential acquiror, the bylaw amendment directly favored WLR. J.A. 2931-36; 3373-79.

3. Poison Pill

Taking maximum advantage of the Va. Scheme, the WLR Board adopted a Poison Pill to insure further that Tyson could not acquire WLR without Board approval. Under the Poison Pill, if Tyson were to acquire more than

15% of WLR's shares, rights to purchase $136 of WLR stock for $68 are issued to all WLR shareholders except Tyson, thereby diluting the value and voting rights of Tyson's stock. J.A. 2991-95. The WLR Board did no investigation into the reasons for the Pill, other than to acknowledge that its purpose was to block the Tyson Offer, regardless of price. J.A. 690; 844-48; 908; 2194; 2281-83.

4. *Golden Parachutes*

Finally, the WLR Board conferred lucrative executive severance, or "golden parachute," agreements upon numerous of its senior officers, including WLR's chief executive officer, who voted to approve his own golden parachute. J.A. 1558-68; 2130-32; 2145-48. On a change of control, these and other golden parachutes could cost WLR up to $7.3 million before "gross-up," or 50% of WLR's entire fiscal year 1993 net income. J.A. 2998.

D. The Tyson Offer

On March 9, 1994, Tyson took its non-coercive, all-cash, premium-priced Offer directly to WLR's shareholders through its wholly-owned subsidiary, WLR Acquisition Corp. J.A. 4641; 3010-15; 2976-83. The WLR Board subsequently set the Control Share Act referendum for May 21, 1994. J.A. 5203.

Prior to the referendum, WLR made the indefensible announcement in its Proxy Statement that only 59,095 shares held by WLR officers were ineligible under the Control Share Act to vote in the referendum. J.A. 4940. WLR also asserted that shares controlled by the Four Officers—13% of WLR's shares owned by them, plus an additional 3% held by their associates, or a total of about 16% of WLR's shares—were eligible to vote.

These disclosures and contrived resignations of the Four Officers, coupled with Tyson's inability to vote its own shares, created the clear perception that WLR would win the control share referendum. Thus, many WLR shareholders who had independent business relationships

with WLR were intimidated into voting against Tyson for fear of economic reprisal from WLR if they voted for Tyson. J.A. 3365-74. Tyson received 3,152,830 votes out of 10,896,672 eligible shares. App. 82a-83a. The 1,603,800 eligible shares that did not vote were all counted against Tyson. App. 83a. Tyson believes that at least 1,605,941 shares were ineligible to be voted. J.A. 5208.

E. Delay in Proceedings

The District Court set a leisurely schedule in addressing Tyson's claims, including the claim that the Va. Scheme is unconstitutional, notwithstanding that delay is one of the most effective means that a target company can employ to hinder a hostile takeover. *Edgar v. MITE*, 457 U.S. 624, 637-38 (delay is the "most potent" weapon in a tender offer fight); *Dan River, Inc. v. Icahn*, 701 F.2d 278 (4th Cir. 1983) (courts must expedite rulings in hostile takeover litigation or target management will benefit unfairly from delay).

WLR took advantage of the District Court's failure to expedite its rulings by acquiring Cuddy Farms, Inc. ("Cuddy") in July of 1994 for cash and approximately 10% of WLR's shares. J.A. 3974. WLR conditioned the deal on Cuddy's agreement that the WLR Board would control voting of the shares for a four-year period. It is clear that WLR's directors improperly used corporate assets to buy Cuddy's votes, representing 10% of WLR's shares, for the sole purpose of perpetuating their own control over the corporation. J.A. 3975.

COURSE OF PROCEEDINGS AND DISPOSITION BELOW

WLR filed this action on February 6, 1994, seeking declarations that the Virginia Control Share Act and Virginia Affiliated Transactions Act were constitutional and that WLR's Poison Pill was valid. J.A. 25. Tyson answered the amended complaint on February 25, 1994 and submitted counterclaims against WLR and its directors.

Tyson sought, among other things, a declaration that the Va. Scheme was unconstitutional, a declaratory judgment regarding voting eligibility in the control share referendum, and an injunction against entrenchment actions taken by the WLR Board. J.A. 104; 351. The District Court had jurisdiction over this matter pursuant to 28 U.S.C. §§ 1331, 1332, 1337, 1367 and 2201. J.A. 27; 109; 356.

Notwithstanding the exigencies of the pending Tyson Offer, the District Court set the case for a bench trial on September 12-15, 1994. J.A. 197-99; 210. Tyson then requested a prompt preliminary injunction hearing aimed solely at issues affecting the control share referendum. J.A. 220. The Magistrate Judge rejected Tyson's request and set the hearing on Tyson's contemplated motion for May 26, 1994—five days *after* the referendum was to (and did) take place. J.A. 264-73; 349.

Tyson's May 2, 1994 preliminary injunction motion addressed all issues raised by Tyson in this case, including the constitutionality claims. J.A. 2948. At WLR's request, the Magistrate Judge entered an order (affirmed by the District Court) limiting the subject matter of the post-referendum May 26 hearing solely to voting rights under the Control Share Act. J.A. 3155; 3382. The hearing on the constitutionality of the Va. Scheme was held six weeks later—five months after WLR had commenced this action. J.A. 3661. The District Court ruled preliminarily that the Va. Scheme was constitutional under both the Supremacy and Commerce Clauses. App. 49a-73a.

Recognizing that the District Court's interpretation of § 690 largely precluded Tyson from developing an evidentiary record, Tyson agreed to have the District Court enter final judgment on the preliminary injunction record, supplemented with affidavits filed by the parties.[3] On

[3] Due to the Cuddy acquisition by WLR and the prior rulings of the District Court, Tyson was faced with a resulting decrease in the value of WLR. Accordingly, Tyson determined that its $30

December 6, 1994, the District Court entered its final order and memorandum opinion, which incorporated all prior rulings, and denied Tyson's claim that the Va. Scheme is unconstitutional. App. 33a-48a.[4]

Tyson appealed from the District Court's December 6 order, and the other District Court rulings incorporated therein, challenging, among other things, the constitutionality of the Va. Scheme under the Supremacy and Commerce Clauses. On September 22, 1995, after hearing oral argument, the Fourth Circuit affirmed all of the District Court's rulings. App. 1a-32a.

In finding the Va. Scheme constitutional under the Supremacy Clause, the Fourth Circuit ruled that Congress, when it enacted the Williams Act to regulate important aspects of the tender offer process, did not intend to preempt state anti-takeover statutes such as those contained in the Va. Scheme. App. 11a. The Fourth Circuit (i) viewed the purpose of the Williams Act as solely to ensure that shareholders of a target corporation receive certain information relating to tender offers, (ii) refused to embrace the "meaningful opportunity for success" test developed by several district courts applying the Williams Act and (iii) concluded, without any analysis or explanation, that WLR shareholders were not deprived of relevant information and that the Va. Scheme does not frustrate the "Williams Act's goal of investor protection." App. 12a, 13a.

The Fourth Circuit also concluded that the Va. Scheme does not discriminate between in-state and out-of-state

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Offer price no longer represented fair value. Tyson terminated its Offer on August 4, 1994. J.A. 3975-76. Tyson remains ready to renew its Offer if the District Court's rulings, as affirmed by the Fourth Circuit, are modified or reversed. J.A. 3976-77.

[4] In reaching its opinion, the District Court ignored its own discovery ruling concerning § 690 by conducting an extraordinary *in camera* review of the substantive advice received by the Board. App. 38a. Such advice, now apparently relevant to the District Court, was never made available to Tyson, much less tested through discovery.

bidders and, without any analysis and support, that "the statutes in the instant case do not erect a complete ban on the control of such corporations." App. 14a, 15a. The Fourth Circuit stated that "Virginia is permitted to determine that hostile takeovers can be detrimental to Virginia corporations," and may regulate takeovers accordingly. App. 15a. Thus, the Fourth Circuit concluded that the Va. Scheme did not fail either of the two Commerce Clause tests for constitutionality—discrimination against interstate commerce and whether the burden imposed on interstate commerce by a state statute is clearly excessive to the potential local benefits of such statute. App. 16a.

REASONS FOR GRANTING THE WRIT

This case presents a straightforward, but critically important, question of constitutional law—may a state enact protectionist legislation that prohibits successful hostile tender offers for shares of that state's publicly-traded corporations. No state or federal court has had occasion to address the constitutionality of a statutory scheme so aggressively antagonistic to tender offers as the Va. Scheme. Thus, this case is a rare opportunity for this Court to provide guidance in assessing the constitutionality of state laws that hinder, or even eliminate, hostile takeovers. Failure to review and reverse the Fourth Circuit's decision with respect to the Va. Scheme will have national impact as other states mimic Virginia to protect local corporations. This trend will operate to the detriment of shareholders and greatly impair a vital insurer of economic efficiency—hostile takeovers.

I. THE FOURTH CIRCUIT ERRED IN FINDING THE VA. SCHEME CONSTITUTIONAL UNDER THE SUPREMACY CLAUSE

A. WLR's Use of the Va. Scheme to Block the Tyson Offer

As discussed in the Statement of the Case above, the Va. Scheme permitted the WLR Board to implement numerous anti-takeover measures to block the Tyson

Offer. Given the permissive standard of § 690, the WLR Board was free to take the following entrenchment actions with the comfort that such actions were immune from any significant discovery or judicial review: adopt a poison pill; manipulate voting eligibility and the record date under the Control Share Act; approve lucrative golden parachutes for management; and use the District Court's delay in considering this matter to acquire Cuddy and thereby "lock-up" control of 10% of WLR's stock.

Not only did the WLR Board take these actions because they opposed the Tyson Offer, WLR directors testified frankly in deposition that the amount of the Tyson Offer was irrelevant to their decision to entrench themselves. Thus, any increased offer from Tyson—no matter how uneconomic—would have been futile; the WLR Board would not approve the sale of WLR at any price.

B. Testimony of Expert Kenneth M. Lehn

Dr. Kenneth M. Lehn, who was the SEC's chief economist from 1987 to 1991 and testified on behalf of Tyson during the District Court proceedings, analyzed the Va. Scheme and its effect on hostile tender offers for Virginia corporations. In uncontroverted affidavits, Dr. Lehn concluded that:

1. Takeovers generally provide significant gains to shareholders, especially to target company shareholders;

2. The Tyson Offer was not "two-tiered" or coercive, was not highly conditional, represented a large premium over the pre-offer price, and appeared to be fully-priced;

3. The Va. Scheme so exacerbates the advantage of target management in a contest for control of a Virginia corporation that any possibility that a potential acquiror will prevail in a hostile contest is eliminated; and

4. A bidder that attempts to effect a hostile acquisition of a Virginia corporation has no practical

> opportunity for success if that corporation avails itself of the protections afforded by the Va. Scheme.

J.A. 2970-3004.

Dr. Lehn's testimony is clear: Virginia's statutory protections not only shift the strategic advantage in a contest for control away from a hostile bidder and to target management, such protections also empower target management to block a hostile takeover, regardless of the price of the tender offer. Thus, the Va. Scheme does more than simply tip the balance in favor of management—it eliminates altogether any chance for a tender offeror to succeed without board approval. Indeed, this conclusion was confirmed by the Virginia Attorney General, who observed that the Va. Scheme permits a tender offer to succeed only if the target's directors first approve the offer:

> [The Va. Scheme] encourage[s] the preservation of the traditional process for effecting a change in control of the enterprise—*namely, making board approval the first step in the process.*

Amicus Curiae Brief for James S. Gilmore, III, Attorney General of the Commonwealth of Virginia at 3, *WLR Foods, Inc. v. Tyson Foods, Inc.*, 65 F.3d 1172 (4th Cir. 1995) (No. 95-1039) (emphasis supplied).

When even non-coercive tender offers of the kind made by Tyson can be stopped cold by actions taken pursuant to the Va. Scheme, no reasonable argument can be made that the Va. Scheme "protects" shareholders—only target management seeking to entrench itself is protected.

C. The Va. Scheme Is Preempted by the Williams Act

1. *The Supremacy Clause*

State law is preempted under the Supremacy Clause, U.S. Const. art. VI, cl. 2, when it "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *CTS Corp. v. Dynamics*

Corp. of America, 481 U.S. 69, 78-79 (1987) (quoting *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941)). By eradicating successful hostile tender offers of Virginia corporations, the Va. Scheme stands as an obstacle to the congressional purposes set forth in a federal statute—the Williams Act—and is thus preempted under the Supremacy Clause.

2. *The Purposes of the Williams Act*

The Williams Act regulates the tender offer process and ensures disclosure to target company shareholders of certain relevant information necessary to an informed shareholder decision. App. 94a-102a. It also establishes certain timing procedures that are designed to protect shareholders from possible coercive aspects to certain tender offers. App. 94a-102a. Since the Tyson Offer was an all-cash, non-coercive, fully-priced offer, the shareholder protections of the Williams Act are not necessary to protect WLR's shareholders from any improper coercion arising out of the Tyson Offer. In fact, giving target management any tools to disrupt such non-threatening offers can *only* be detrimental to shareholders; tender offeror's should be able to take offers like the Tyson Offer directly to shareholders without target board involvement.

Among the various court decisions interpreting the Williams Act, two schools of thought have emerged concerning what Congress sought to accomplish with the Williams Act. One school argues that the Williams Act has "twin aims . . . [i] protection of target shareholders and [ii] neutrality as between bidders and target companies." *Finnegan v. Campeau Corp.*, 915 F.2d 824, 829 (2d Cir. 1990), *cert. denied*, 499 U.S. 976 (1990). The Second Circuit in *Finnegan* ruled that federal antitrust laws that "discourage potential bidders from making a tender offer," and thus "discourage takeover activity," conflict with the

legislative policy of the Williams Act and are preempted. *Finnegan*, 915 F.2d at 831-32.[5]

Various federal district courts similarly have concluded that Congress, in enacting the Williams Act, intended to guarantee a "meaningful opportunity for success" to tender offerors seeking to acquire a corporation without board approval. *See, e.g., West Point-Pepperell, Inc. v. Farley Inc.*, 711 F. Supp. 1096, 1097 (N.D.Ga. 1989); *City Capitals Assocs. Ltd. Partnership v. Interco, Inc.*, 696 F. Supp. 1551, 1555 (D.Del. 1988), *aff'd*, 860 F.2d 60 (3rd Cir. 1988); *BNS Inc. v. Koppers Co., Inc.*, 683 F. Supp. 458, 464-76 (D. Del. 1988). The "meaningful opportunity for success" test recognizes that the Supremacy and Commerce Clauses place an outer limit on how far states can go in so heavily regulating hostile tender offers that consummation of such offers is precluded.

The other school of thought reduces the purpose of the Williams Act solely to guaranteeing that certain information reaches shareholders confronted with a tender offer. Moreover, so argues this school, it is incorrect to recognize an independent Williams Act purpose of maintaining neutrality between bidder and management. Thus, this school asserts that state anti-takeover legislation need not ensure that tender offerors have a "meaningful opportunity for success" in order to pass constitutional muster.

Prior to the Fourth Circuit's decision in this case, the leading case representing this school of thought was *Amanda Acquisition Corp. v. Universal Foods Corp.*, 877 F.2d 496 (7th Cir. 1989), *cert. denied*, 493 U.S. 955 (1989), in which the Seventh Circuit opined that "[t]o say that Congress wanted to be neutral between bidder and target—a conclusion reached in many of the Court's

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[5] Prior to its decision in this case, the Fourth Circuit had adopted this same interpretation of the Williams Act. *See IU International Corp. v. NX Acquisition Corp.*, 840 F.2d 220, 222 (4th Cir. 1988) ("[t]he Williams Act is designed to maintain neutrality between bidder and target.").

opinions—is not to say that it also forbade the states to favor one of these sides." The Fourth Circuit embraced this position in *Amanda*, stating that:

> The fact that Congress, when it enacted the Williams Act, did not intend to create an advantage for target management in the takeover situation, does not necessarily mean that Congress meant to prevent the states from allowing management an advantage which is not unfair to investors.

App. 11a.

While this Court on several occasions has interpreted and applied the Williams Act, it has never definitively resolved the debate between these two schools of thought. Given the far-reaching effect that the Fourth Circuit's decision will have on other state schemes regulating hostile tender offers, it is fully appropriate for this Court to clarify Congress' intentions with respect to the scope and purposes of the Williams Act.

As indicated below, based on prior Court decisions and on the legislative history of the Williams Act, it is clear that Congress did not intend for states to disrupt the balance between bidder and target and, in any event, did not sanction an oppressive scheme like the Va. Scheme that permits a target board to block completely a hostile takeover of a Virginia corporation.

3. *Prior Court Decisions Applying the Williams Act*

In the seminal Court decision interpreting and applying the Williams Act, *Piper v. Chris-Craft Industries, Inc.*, 430 U.S. 1 (1977), this Court concluded that the Williams Act is designed to protect shareholders by creating a level playing field between the target management and the bidder. *Piper*, at 26-30. Congress was convinced that investors are best protected from entrenched management and hostile bidders—both of whom could pose a threat to the interests of an independent shareholder—by a "policy of neutrality in contests for control." *Id.*

Later Court cases support such a reading of the Williams Act. In *MITE*, Justice White wrote that it is "crystal clear that a major aspect of the effort to protect the investor was to avoid favoring either management or the takeover bidder." 457 U.S. at 633 (plurality opinion). *Accord Rondeau v. Mosinee Paper Corp.*, 422 U.S. 49, 58 (1975) ("Congress expressly disclaimed an intention [with the Williams Act] to provide a weapon for management to discourage takeover bids[;] Indeed, the Act's draftsmen commented upon the 'extreme care' which was taken 'to avoid tipping the balance of regulation either in favor of management or in favor of the person making the takeover bid.' ") (citations omitted).

Thus, this Court—particularly in *Piper* and *MITE*—could not have been clearer: A primary purpose of the Williams Act is to ensure neutrality between the bidder and management, as Congress has determined that only neutrality ensures that investors are best protected in the hostile tender offer context. No decision of this Court has ruled otherwise, and any lower court ruling to the contrary, which includes the Fourth Circuit's opinion in this case and the Seventh Circuit's decision in *Amanda*, cannot properly be based on a prior ruling by this Court.

The Court's most recent pronouncement concerning hostile tender offers came eight years ago in *CTS*. While this Court upheld the constitutionality of a control share statute similar to Virginia's Control Share Act, it expressly refrained from rejecting Justice White's plurality holding in *MITE* that the Williams Act preempts any state-level attempt to give target management tools to combat hostile tender offers, as follows:

> We need not question that reasoning, however, because we believe that the Indiana [Control Share] Act passes muster even under the broad interpretation of the Williams Act articulated by Justice White in MITE.

CTS, 481 U.S. at 81.

As a result, *CTS* does not stand for the proposition that states are free to enact legislation that favors target management by giving such management additional tools to combat hostile tender offers. The critical assumption in *CTS* was that the Indiana control share act at issue in that case did *not* make subsequent tender offers more difficult. *CTS*, 481 U.S. at 93 (there is little evidence that the Indiana control share act will "limit the number of successful tender offers"). *See Finnegan*, 915 F.2d at 832 (The *CTS* Court concluded that, "even under the broad interpretation of the [Williams] Act adopted by the plurality in *MITE*, an Indiana takeover statute was not preempted because it did not favor incumbent management over hostile bidders in contests for control.").

Thus, the most recent Court decision providing guidance to courts assessing the constitutionality of a state law that hinders hostile takeovers, thereby disrupting the balance between target and bidder that the Williams Act intended to preserve, is *MITE*, which struck down such a state law under the Supremacy Clause.

4. *The Legislative History of the Williams Act*

The legislative history of the Williams Act fully supports Justice White's interpretation in *MITE* that states are not free to tilt the balance in a contest for control in favor of management. This history demonstrates Congress' intent to promote shareholder democracy in tender offers by "requir[ing] full and fair disclosure for the benefit of investors while at the same time providing the offeror and management equal opportunity to fairly present their case." H.R. Rep. No. 1711, 90th Cong., 2nd Sess. 3, 4 (1968).

Congress understood when it enacted the Williams Act that management enjoys substantial advantages over a bidder in a contest for control and that a state scheme that favors management promotes entrenchment and harms

shareholders. Thus, with the Williams Act, Congress took:

> extreme care to avoid tipping the balance of regulation either in favor of management or in favor of the person making the takeover bid.

S. Rep. No. 550, 90th Cong., 1st Sess. 2 (1967). Congress recognized that tender offers serve a *useful* function, that management has plenty of weapons to protect itself from a change of control, and that management usually succeeded in defeating takeover attempts. *Id.* at 3 (finding that tender offers "serve a useful purpose in providing a check on entrenched but inefficient management."). Congress was particularly intent on not giving target management the means to delay tender offer proceedings, because delay alone is often enough to block a hostile takeover. *See MITE*, 457 U.S. at 637-38 (In enacting the Williams Act, Congress "recognized that delay can seriously impede a tender offer" and sought to avoid it) (citations omitted).

Congress' tacit assumption in enacting the Williams Act was that successful hostile tender offers would continue to be possible, even though Congress was aware that certain state laws may affect hostile tender offers. However, Congress was expressly opposed to any regulation, whether state or federal, that discouraged hostile tender offers. *See* S. Rep. No. 550, 90th Cong., 1st Sess., 3 (1967) ("takeover bids should not be discouraged because they serve a useful purpose in providing a check on entrenched but inefficient management"); *see also Finnegan*, 915 F.2d at 831 (discouraging takeover activity was "an end Congress sought to avoid in enacting the Williams Act."). Thus, any state scheme that *eliminates* successful hostile tender offers obviously stands as an obstacle to the accomplishment of the "full purposes and objectives" of the Williams Act, and, therefore, is preempted by virtue of the Supremacy Clause. *See Hines v. Davidowitz*, 312 U.S. 52, 67-68 (1941).

In 1976, when it enacted the Hart-Scott-Rodino Antitrust Improvements Act, 15 U.S.C. § 18a, Congress confirmed that a chief purpose of the Williams Act (which had been enacted in 1968) was to maintain neutrality. The House Report on this Act, which establishes a short waiting period to assess possible antitrust effects of a proposed merger, provides that:

> [A] longer delay might unduly favor the target firm's incumbent management, and permit them to frustrate procompetitive cash tenders. This ten-day waiting period thus underscores *the basic purpose of the Williams Act—to maintain a neutral policy towards cash tender offers, by avoiding lengthy delays that might discourage their chances for success.*

H.R. Rep. No. 1373, 94th Cong., 2d Sess. 12 (1976). Given Congress' clear goals with the Williams Act, to assert that Congress nevertheless intended to allow *states* to negate those goals by frustrating and discouraging tender offers through state legislation simply has no basis in the Williams Act's legislative history or in this Court's rulings. *See Seatrain Shipbuilding Corp. v. Shell Oil Co.*, 444 U.S. 572, 596 (1980) (The views of a subsequent Congress are entitled to "significant weight.").

D. The Fourth Circuit's Williams Act Analysis Is in Error

The Fourth Circuit's opinion, in concluding that the Va. Scheme is not preempted by the Williams Act, ignores the effect of the Va. Scheme on hostile takeovers and fails to appreciate the legislative history cited above and this Court's commentary in *Piper* and *MITE*. The Fourth Circuit adopted the *Amanda* school of thought by asserting that neutrality "was but an incidental result" of the purpose of the Williams Act to protect investors and that the Williams Act was enacted solely to ensure "disclosure of information in order to allow shareholders to make an informed decision and to prevent coercion in the tender offer context." App. 10a, 12a. The Fourth Circuit refused to accept a key assumption of Congress

in enacting the Williams Act—that the best way to protect shareholders is to ensure a level playing field between management and bidder. *Piper*, 430 U.S. at 29.

The Fourth Circuit concedes that "the four Virginia statutes may work to give target management an advantage in the tender offer context." App. 13a. Under a proper reading of the Williams Act, this concession alone is sufficient to strike down the Va. Scheme as unconstitutional under the Supremacy Clause.

In essence, the Fourth Circuit asserts that states are free to determine how best to protect investors—and are free to reject Congress' hard and fast rule that investors are best protected by neutrality between bidder and target management. Since Virginia apparently has determined that investors are better protected when management holds statutory advantages that can be used to defeat a hostile bidder—an untenable proposition—the Fourth Circuit concluded that the Williams Act's goal of neutrality can be disregarded.

The Fourth Circuit bases its misreading of the Williams Act in part on a misuse of a quotation from this Court's *Piper* decision. The Fourth Circuit quotes *Piper*'s statement that the Williams Act's

> policy of evenhandedness does not go . . . to the purpose of the legislation . . . . Neutrality is, rather, but one characteristic of legislation directed toward a different purpose—the protection of investors.

App. 11a (quoting *Piper*, 430 U.S. at 29). In relying on this *Piper* quotation, the Fourth Circuit asserts that the goal of neutrality between bidder and target is not so "central" to the purpose of the Williams Act that the Act should be held to preempt the Va. Scheme, which the Fourth Circuit admits "regulate[s] the balance between a target and a bidder." App. 12a.

However, in *Piper*, this Court was faced with the entirely unrelated issue of whether a tender offeror had a private right of action under the Williams Act. The full

quotation, with omitted portions italicized, reads as follows:

> *Congress was indeed committed to a policy of neutrality in contests for control, but its* policy of evenhandedness does not go *either* to the purpose of the legislation *or to whether a private cause of action is implicit in the statute.*

Piper, 430 U.S. at 29.

As is clear upon reading the quotation in context, the *Piper* Court was simply emphasizing that Congress' policy of evenhandedness was not relevant to a determination as to whether the Act provided for a private right of action. The quotation however, was *not* intended to indicate any Congressional view—or Court view—that, with respect to contests for control, states are free to upset the balance between bidder and management. Indeed, this Court in *Piper* goes on to state that:

> Accordingly, the congressional policy of "evenhandedness" is non probative of the quite disparate proposition that the Williams Act was intended to confer rights for money damages upon an injured takeover bidder.

Id. at 31. Thus, the Fourth Circuit has relied incorrectly on a quotation in *Piper* taken out of context to support its view that Congress did not intend to prevent states from tipping the playing field in favor of management in a contest for control.

The Fourth Circuit also improperly cites *CTS* in support of its view of the Williams Act. App. 10a-11a. Unlike the Va. Scheme at issue here, however, the state law analyzed in *CTS* was viewed by this Court as *benefitting* shareholders in the process of regulating tender offers. As stated above, this Court concluded in *CTS* that there was little evidence that the Indiana control share act would "limit the number of successful tender offers." *CTS*, 481 U.S. at 93. The Va. Scheme, on the other hand, clearly works to *harm* shareholders by not just making tender offers more difficult but by totally eliminating successful

tender offers for Virginia corporations, regardless of price. *See* Testimony of Dr. Lehn, J.A. 2970-3004.

In addition, *CTS* is distinguishable because it reviewed the constitutionality of only one statute and not a statutory scheme. Thus, *CTS* does not dictate a conclusion that the Va. Scheme is constitutional. Just as the United States Constitution does not permit a state to pass a statute that expressly prohibits hostile (non-board approved) tender offers for its corporations, it does not permit a state to enact a series of statutes that indirectly have the same effect. *See West Lynn Creamery v. Healy*, 114 S. Ct. 2205, 2214-15 (1994) (This Court found that two statutes, each individually constitutional, could work together in an unconstitutional manner).

Reducing the Williams Act to a statute that merely ensures adequate information flow to the shareholders fails to recognize that shareholders need more than information to remain protected from management seeking to entrench itself. In this case, regardless of the information that flowed to WLR's shareholders pursuant to the Williams Act, shareholders were harmed by a multitude of defensive actions taken by the WLR Board, including: adoption of a poison pill (in conjunction with a lax fiduciary duty standard); manipulation of control share voting; and the Cuddy acquisition with accompanying Board control over an additional 10% of WLR's stock.

Because the Va. Scheme, on its face and as applied, permits only the commencement of hostile tender offers, while foreclosing their successful completion, the Va. Scheme conflicts with the purposes of the Williams Act and must be declared unconstitutional under the Supremacy Clause.

II. THE FOURTH CIRCUIT ERRED IN FINDING THE VA. SCHEME CONSTITUTIONAL UNDER THE COMMERCE CLAUSE

The Commerce Clause—U.S. Const. art. I, § 8, cl. 3—has long been interpreted to restrict states from excessively regulating interstate commerce, even in the absence

of preempting federal regulation in the area. *See Cooley v. Bd. of Wardens*, 53 U.S. (12 How.) 299 (1852). This Court has created two alternative tests for determining whether state regulation violates the Commerce Clause. *First*, a state statute is unconstitutional if it clearly discriminates against interstate commerce and is not justified by a valid purpose unrelated to economic protectionism. *C & A Carbone v. Town of Clarkstown*, 114 S. Ct. 1677, 1682 (1994). *Second*, a state statute is unconstitutional if it imposes a burden on interstate commerce that is clearly excessive in relation to the putative local benefits served by the statute. *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142 (1970). The Va. Scheme fails both tests.

A. The Va. Scheme Discriminates Against Interstate Commerce

As demonstrated above, the Va. Scheme imposes an effective ban on hostile tender offers, eliminating the flow of interstate commerce by shutting down the market for control of Virginia corporations. Thus, the Va. Scheme hoards a local resource—control of publicly-traded Virginia corporations and their assets—for the economic benefit of the state and its citizens. *See Carbone*, 114 S. Ct. at 1683. Such a protectionist scheme, favoring in-state over out-of-state economic interests, cannot pass constitutional muster. *See Chambers Medical Technologies v. Jarrett*, 841 F. Supp. 1402, 1414 (D.S.C. 1994), *aff'd in part*, 52 F.3d 1252 (4th Cir. 1995).

The Virginia General Assembly enacted the Va. Scheme based on an express belief that Virginia's corporations benefit the state by creating jobs, providing substantial tax revenue for state and local governments, and making contributions to charitable organizations. App. 128a-129a. These purposes are not legitimate under the Commerce Clause. *Lewis v. BT Investment Managers, Inc.*, 447 U.S. 27, 43-44 (1980); *Baldwin v. G.A.F. Seelig, Inc.*, 294 U.S. 511, 527 (1935).

Inasmuch as Tyson clearly established that the Va. Scheme blocks successful tender offers and thus discrimi-

nates against interstate commerce, the burden shifts to WLR to prove (i) that the Va. Scheme was justified by a valid purpose unrelated to economic protectionism, *Oregon Waste Sys. v. Dep't of Envtl. Quality*, 114 S. Ct. 1345, 1351 (1994), *and* (ii) that, under the strictest scrutiny, other means do not exist to advance a legitimate local interest, such as protection of health and safety. *Carbone*, 114 S. Ct. at 1683-84. The record presented to the Fourth Circuit in this case can be searched in vain for any evidence of WLR meeting these burdens. Thus, the Va. Scheme must be held unconstitutional under the Commerce Clause.

Rather than adopt this analysis, the Fourth Circuit instead concluded that, because on its face the Va. Scheme does not purport to treat hostile tender offers made by non-Virginia corporations differently from those made by Virginia corporations, the Va. Scheme necessarily passes constitutional muster. App. 13a-15a. In support of this conclusion, the Fourth Circuit relies on this Court's opinion in *CTS*, which upheld the constitutionality of the Indiana control share act, and on the Seventh Circuit's opinion in *Amanda*, which upheld the constitutionality of the Wisconsin affiliated transactions statute. App. 13a-15a. In both the *CTS* and *Amanda* decisions, the analysis supporting constitutionality turned on the fact that the statute at issue treated both in-state and out-of-state tender offerors equally and neither statute eliminated successful hostile tender offers altogether. *CTS*, 481 U.S. at 93-94.

Because Tyson has thoroughly demonstrated that the Va. Scheme eliminates hostile tender offers altogether, this case must be distinguished from *CTS* and *Amanda*. The Fourth Circuit's conclusory statement that the Va. Scheme does not "erect a complete ban on the control" of Virginia corporations (App. 15a), the linchpin of its analysis, is insupportable based on the testimony of Dr. Lehn and other evidence presented by Tyson.

Moreover, a statute that discriminates against interstate commerce does not pass constitutional muster simply

because it treats in-state and out-of-state persons equally. *Fort Gratiot Sanitary Landfill v. Michigan Dep't of Natural Resources*, 504 U.S. 353 (1992); *Dean Milk Co. v. Madison*, 340 U.S. 349 (1951); *Brimmer v. Rebman*, 138 U.S. 78, 82-83 (1891). Rather, this Court must look beyond the facial neutrality of the Va. Scheme to its practical effects on interstate commerce. *Brown-Forman Distillers Corp. v. New York State Liquor Auth.*, 476 U.S. 573 (1986). Discrimination against interstate commerce may "reside in legislative means as well as legislative ends." *Philadelphia v. New Jersey*, 437 U.S. 617, 626 (1978).

B. The Va. Scheme Imposes an Excessive Burden on Interstate Commerce

The *Pike* balancing test renders the Va. Scheme unconstitutional under the Commerce Clause unless it can be demonstrated that the Va. Scheme provides sufficient local benefits to outweigh the burdens it imposes on interstate commerce. 397 U.S. at 142. Prohibiting, or even severely limiting, successful hostile takeovers in a state imposes substantial burdens on interstate commerce and the national economy. *MITE*, 457 U.S. at 643; *Telvest Inc. v. Bradshaw*, 697 F.2d 576, 580 (4th Cir. 1983); J.A. 2974-75. Given such substantial burdens imposed by the Va. Scheme, permissible local benefits that are equally substantial must be demonstrated to survive the *Pike* test. The alleged local benefits that the Fourth Circuit sets forth—protection of Virginia corporations and its shareholders—are not remotely sufficient to justify the burdens imposed by the Va. Scheme. App. 15a-16a.

The Fourth Circuit asserts that the Va. Scheme benefits Virginia because "Virginia is permitted to determine that hostile takeovers are detrimental to Virginia corporations" and, therefore, to regulate hostile takeovers. App. 15a. The Fourth Circuit cites *CTS* in support of this view, as follows:

> A State has an interest in promoting stable relationships among parties involved in the corporations it

> charters, as well as ensuring that investors in such corporations have an effective voice in corporate affairs.

App. 16a (quoting *CTS*, 481 U.S. at 91).

Again, *CTS* is distinguishable from this case because the *CTS* decision was based on a colorable argument that shareholders benefitted from Indiana's control share act. Here, because the Va. Scheme eliminates hostile tender offers, shareholders are *harmed*. The benefits of the Va. Scheme, to the extent they exist, run not to shareholders but only to management and the board by making its easier for them to entrench themselves.[6] As set forth above, this form of local protectionism is an entirely inappropriate basis for offsetting the heavy burdens the Va. Scheme places on interstate commerce.

By conferring on directors the power to veto tender offers made to shareholders of Virginia corporations, no matter how economically attractive, the Va. Scheme goes well beyond the protections that previously have been afforded directors by other states. Given the extreme favoritism the Va. Scheme shows to management, no court can properly conclude that the Va. Scheme was enacted to protect shareholders of Virginia corporations. *MITE*, 457 U.S. at 644; *Telvest*, 697 F.2d at 578. In addition, WLR's shareholders certainly need no protection from the non-coercive, all-cash and premium-priced Tyson Offer. Tyson has also pledged, upon merging with WLR, that it will not materially affect WLR's relationships with employees, suppliers and customers. J.A. 3015.

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[6] In fact WLR's own expert, Lyman Johnson, concedes that state anti-takeover legislation typically is protectionist in nature. L. Johnson and D. Millon, *Misreading the Williams Act*, 87 Mich. L. Rev. 1862, 1863 (1989) ("Although often shrouded in the rhetoric of shareholder welfare, the primary goal of [state legislation regulating takeover contests] is to protect various non-shareholder interests thought to be adversely affected by hostile takeover activity.").

The Va. Scheme is thus over-inclusive—it applies to non-threatening tender offers that a board opposes—and under-inclusive—it does not protect shareholders from entrenched management. The co-existence of over- and under-inclusivity constitutes evidence that a statutory scheme does not serve legitimate local interests. *Austin v. Michigan State Chamber of Commerce*, 494 U.S. 652, 677-78 (1990) (Brennan, J., concurring); *First Nat'l Bank v. Bellotti*, 435 U.S. 765, 792-93 (1978).

The Fourth Circuit's reliance on a state's inherent right to regulate corporations, which the Fourth Circuit asserts are a product of state law (App. 15a (quoting *CTS*, 481 U.S. at 89)), is also misplaced. States may not ban corporate transactions if the practical effect of the prohibition violates the Commerce Clause. *See MITE*, 457 U.S. at 645.

III. THE QUESTION PRESENTED IS IMPORTANT

Absent review and reversal by this Court, the Fourth Circuit's erroneous decision will launch a "race to the bottom" by encouraging many other states to enact protectionist schemes similar to the Va. Scheme. Such protectionist legislation may well lead inevitably to the substantial eradication of hostile tender offers, eviscerating the clear purposes of the Williams Act. Hostile tender offers, when appropriately regulated, generally are beneficial to shareholders and promote an efficiently-operating economy. J.A. 2970-3004. Without the reasonable threat of a hostile takeover, however, corporate managers will be free to entrench themselves with impunity and at great expense to shareholders and the U.S. economy. *See St. Martin Evangelical Lutheran Church v. South Dakota*, 451 U.S. 772, 780 (1981) (Certiorari granted because of "growing number of federal and state decisions on this [federal statutory] issue."); *McGee v. Int'l Life Ins. Co.*, 355 U.S. 220, 221 (1957) (Certiorari granted because case important to other states with similar laws).

Thus, this Court has a rare opportunity to address what appears to be the most oppressively protectionist

anti-takeover statutory scheme of any state in the country. Even the District Court conceded that § 690 "may appear to offer more protection for directors than do most or all analogous statutes in other states[.]" App. 41a-42a. The Va. Scheme consists of a unique constellation of all three of the classic state anti-takeover statutes: a control share act; an affiliated transactions act; and a poison pill act. However, the final ingredient that makes the Va. Scheme so explosive—added this September when the Fourth Circuit issued its opinion—is that the permissive standard of § 690 applies to Virginia directors faced with a hostile tender offer. Insulated by the weak standard of § 690, Virginia corporate boards are free to veto any tender offer, regardless of price, and entrench themselves at the expense of shareholders—without fear of any court review of its actions. *See Santosky v. Kramer*, 455 U.S. 745, 749-50 (1982) (Certiorari granted to review state standard of proof that was lower than standard in 35 states).

Court review will bring certainty and uniformity to a significant aspect of our national economy—hostile takeovers—by resolving definitively whether Congress intended to preempt state laws that favor management and render successful hostile takeovers more difficult, or impossible, to achieve. Without the guidance that only this Court can provide concerning the proper application of the Williams Act and the Commerce Clause, all parties involved in a hostile takeover scenario—target management and board, tender offerors, shareholders and state legislatures—will be unable to predict with certainty whether a state statutory scheme will survive constitutional scrutiny. Economic inefficiencies will be the inevitable result.

* * * *

This case may be the most important case relating to contests for control of corporations in this decade. Without doubt, this action sets the highwater mark for corporate board entrenchment. It involves important, if not

seminal, legal principles that are relevant, and hotly contested, in every hostile takeover situation. Few, if any, hostile takeover cases of this import rise this far through the courts given the economic reality that tender offers necessarily have a short shelf-life in a swiftly-changing market place.

Review and reversal by this Court would have nationwide significance in halting a tide of similarly protectionist legislation that undoubtedly will follow should this Court decline review. Without Court review, there is substantial risk that hostile takeovers will be legislated out of existence. This case involves important questions of federal and constitutional law which have not, but should be, settled by this Court.

CONCLUSION

The petitioners respectfully request that this Court grant a writ of certiorari to the Fourth Circuit.

Respectfully submitted,

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December 21, 1995

APPENDICES

APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

No. 95-1039

WLR FOODS, INCORORATED,
Plaintiff-Appellee,

v.

TYSON FOODS, INCORPORATED;
WLR ACQUISITION CORPORATION,
Defendants-Appellants,

WILLIAM H. GROSECLOSE; HERMAN D. MASON; GEORGE E. BRYAN, CALVIN G. GERMROTH; CHARLES W. WAMPLER, JR.; JAMES L. KEELER; CHARLES L. CAMPBELL; STEPHEN W. CUSTER; J. CRAIG HOTT; WILLIAM D. WAMPLER,
Defendants-Appellees.

ALBEMARLE CORPORATION; BASSETT FURNITURE INDUSTRIES, INCORPORATED; CADMUS COMMUNICATIONS CORPORATION; CENTRAL FIDELITY BANKS, INCORPORATED; CFW COMMUNICATIONS COMPANY; CHESAPEAKE CORPORATION; CRESTAR FINANCIAL CORPORATION; CSX CORPORATION; DANA CORPORATION; DIBRELL BROTHERS, INCORPORATED; ETHYL CORPORATION; EXECUTONE INFORMATION SYSTEMS, INCORPORATED; FIRST COLONY CORPORATION; GARAN, INCORPORATED; JAMES RIVER CORPORATION; LAWYERS TITLE CORPORATION; MEDIA GENERAL, INC.; OLIN CORPORATION; OWENS & MINOR, INC.; PHILIP MORRIS COMPANIES, INCORPORATED; PIEDMONT BANKGROUP, INCORPORATED; THE PITTSTON COMPANY; TFC ENTERPRISES, INCORPORATED; TREDEGAR INDUSTRIES, INCORPORATED; UNION CAMP CORPORATION; UNITED DOMINION REALTY TRUST, INCORPORATED; UNIVERSAL CORPORATION; COMMONWEALTH OF VIRGINIA,
Amici Curiae.

July 13, 1995, Argued

September 22, 1995, Decided

Appeal from the United States District Court
for the Western District of Virginia, at Harrisonburg
James H. Michael, Jr., District Judge—(CA-94-12-H)

Before ERVIN, Chief Judge MURNAGHAN, Circuit Judge, and PHILLIPS, Senior Circuit Judge. Judge Murnaghan wrote the opinion, in which Chief Judge Ervin and Senior Judge Phillips joined.

OPINION

MURNAGHAN, Circuit Judge:

The instant case arose from an attempt by Tyson Foods, Inc. ("Tyson"), a nationwide poultry producer, to acquire WLR Foods, Inc. ("WLR"), a chicken and turkey producer. In early 1994, Tyson engaged in extensive discussions with certain members of WLR's Board of Directors ("the WLR Board") in an attempt to arrange a merger between Tyson and WLR. The WLR Board, resistant to the idea of being acquired by Tyson, adopted various defensive measures to protect WLR against the takeover. Tyson eventually presented a tender offer directly to the stockholders of WLR, but withdrew the offer several months later, claiming that, due to actions taken by the WLR Board, Tyson's offering price was no longer reflective of the value of WLR's stock. Tyson now challenges several rulings of the district court, which found that the defensive tactics adopted by the WLR Board were a valid legal means by which to respond to the threatened takeover of WLR by Tyson.

I. Factual Background

Tyson is a large poultry producer incorporated in Delaware, with its principal office in Arkansas. Tyson conducts operations in many states, including Virginia. WLR is a Virginia corporation with a substantial turkey operation as well as a chicken business. The stocks of both companies are publicly held and traded.

In late 1993 and again on January 3, 1994, Don Tyson, Chairman of Tyson, contacted James Keeler, President and Chief Executive Officer of WLR, with a proposal to merge WLR with Tyson. Don Tyson's proposal included an offer to buy WLR stock from the shareholders at thirty dollars per share. Keeler informed Don Tyson that WLR was not for sale, but nevertheless met with Mr. Tyson on January 12, 1994 to discuss the proposal.

An informal WLR Board meeting was held on January 20, 1994 regarding the Tyson offer. No minutes were recorded at the meeting, and no votes were taken. The consensus of the Board at the meeting was that it preferred for WLR to remain independent and would reject Tyson's offer. On January 24, 1994, Keeler informed Don Tyson that he had spoken with the Board, and that WLR wished to remain independent. On that same day, Don Tyson delivered a letter to WLR's Board describing the acquisition proposal. In response, on January 25, 1994, Keeler issued a letter to WLR shareholders asserting that WLR was "not for sale," but stating:

> As it must, WLR Foods Board will meet in the near future to evaluate Tyson's offer. Be assured that your Board will listen carefully to its advisors and management and make a decision it believes is in the best interest of, and appropriately protects, our shareholders, employees and producers. In this regard, the Board's historical commitment to the continued independence of WLR Foods will be keenly important.

WLR next sought advisors to provide guidance concerning the proposed merger. Keeler travelled to Washington, D.C. and with the help of WLR management and counsel, interviewed potential financial advisors. At a WLR Board meeting on January 25, 1994, the Board approved the suggestion of the management team to hire Goldman, Sachs & Co. and Wheat, First, Butcher & Singer for financial advice, as well as to retain the services of two law firms, Sullivan & Cromwell and Wharton, Aldhizer & Weaver. On January 28, 1994, the WLR Board met with its management, advisors, and counsel to discuss the implications of the merger proposal and to receive information from the advisors. The minutes of the meeting reflect that no decision was reached that day regarding the merger.

On February 4, 1994, the WLR Board reconvened to discuss the merger with its advisors. After representatives of Goldman, Sachs & Co. concluded that Tyson's offer of thirty dollars per share was inadequate, the Board considered the recommendation and voted to reject the Tyson merger proposal. The Board also adopted certain measures to defend against a possible takeover attempt. The Board amended WLR's bylaws to provide that the chairman and vice-chairman of the WLR Board were not officers of the corporation. It further amended the bylaws to establish that the record date for purposes of any vote under the Virginia Control Share Acquisitions Act would be the date on which an acquiring person requested a special shareholder's meeting for such a vote.[1] In addi-

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[1] The Virginia Control Share Acquisitions Act, Va. Code Ann. §§ 13.1-728.1 to -728.9, provides that if a bidder, such as Tyson, obtains a certain percentage of the shares in a target corporation, it will not be permitted to vote those shares unless a majority of the corporation's other shareholders vote at a control share referendum to grant the bidder voting rights. The record date is the date on which it is determined which holders of stock will be entitled to vote in the control share referendum.

tion, four WLR directors, Charles Wampler, William Wampler, Herman Mason, and George Bryan, resigned from their positions as WLR employees, and the Board approved a package of life-time health benefits for each of them. Finally, the WLR Board adopted a shareholder rights plan, or "poison pill," in order to provide that the acquisition by Tyson of fifteen percent or more of WLR's stock would trigger an option for all shareholders except Tyson, the acquiring shareholder, to purchase WLR stock at a favorable price, thereby diluting the value and voting rights of Tyson's stock. WLR notified Don Tyson by a letter dated February 6, 1994 that the Board had unanimously decided not to pursue merger negotiations with Tyson.

WLR initiated the instant action in the United States District Court for the Western District of Virginia on February 6, 1994, seeking declaratory relief regarding the constitutionality of certain Virginia statutes as well as the validity of the shareholders rights plan adopted at the February 4, 1994 WLR Board meeting. Tyson answered WLR's complaint on February 25, 1994 and asserted counterclaims against WLR. Tyson sought a declaration that the Virginia statutes which allow companies to adopt defensive measures against takeover attempts were unconstitutional, as well as an injunction against defensive actions taken by the WLR Board under those statutes.

On March 9, 1994, Tyson presented its thirty dollars per share cash tender offer directly to WLR's stockholders. The offer was launched through Tyson's wholly-owned subsidiary, WLR Acquisition Corp., a company that was created to effectuate the merger with WLR. On April 14, 1994, Tyson submitted a control share statement to WLR. April 14 thus became the Control Share Acquisitions Act record date under WLR's amended bylaws, and a special shareholders meeting and control share referendum were set for May 21, 1994. At the shareholders meeting, the WLR directors urged the shareholders to vote against the referendum, which would have

permitted Tyson to vote its shares in favor of a takeover. Tyson was not able to secure a majority of the shares eligible to vote, and the referendum was, therefore, defeated.

On July 27, 1994, WLR entered into an agreement with Cuddy Farms, Inc. and Cuddy International Corp. (collectively, "Cuddy") to acquire Cuddy's assets in exchange for cash and a percentage of WLR's common stock. As part of the transaction, WLR and Cuddy came to an agreement which provided that Cuddy would vote the approximately ten percent of WLR's stock that it had acquired in the transaction in accordance with the directions of the WLR Board for a four-year period. The Cuddy transaction further diluted the voting power of Tyson's WLR stock. Tyson terminated its tender offer on August 4, 1994, feeling that its offer of thirty dollars per share was no longer an accurate reflection of the worth of WLR's stock.

On December 6, 1994, the district court in the instant case entered a final order denying relief to Tyson on its claims. On appeal, Tyson both renews the claims raised in the district court against WLR, and challenges a district court ruling denying Tyson access during discovery to the substantive financial and legal advice given to the WLR Board regarding the merger. Tyson contends that it remains prepared to renew its tender offer if the district court's orders are modified or reversed. For the reasons stated below, however, we affirm.

II. Constitutionality of the Virginia Statutes

We address first Tyson's challenge to the constitutionality of four Virginia statutes: the Control Share Acquisitions Act ("Control Share Act"), Va. Code Ann. §§ 13.1-728.1 to -728.9; the Affiliated Transactions Act, Va. Code Ann. §§ 13.1-725 to -727.1; the "Poison Pill Statute," Va. Code Ann. § 13.1-646; and the "Business Judgment Statute," Va. Code Ann. § 13.1-690. Tyson claims that

the four statutes, considered in concert, impermissibly restrict the ability of a bidder to effect a takeover of a Virginia corporation. According to Tyson, the statutes thereby controvert the purposes of the Williams Act, 15 U.S.C. §§ 78m(d)-(e) and 78n(d)-(f), and are preempted by virtue of the Supremacy Clause of the United States Constitution, U.S. Const. art. VI, cl. 2. Further, Tyson claims that because they render hostile takeovers impossible in practice, the Virginia statutes violate the Commerce Clause of the United States Constitution, U.S. Const. art. I, § 8, cl. 3. The district court held that the statutory scheme was not preempted by the Williams Act and did not violate the Commerce Clause. The district court's analysis of the statutes in the instant case presents questions of law which we review de novo. See *Johnson v. Hugo's Skateway*, 949 F.2d 1338, 1349 (4th Cir. 1991).[2] The first statute at issue, the Control Share Act, Va. Code Ann. §§ 13.1-728.1 to -728.9, provides that when an acquiror holds a certain percentage of the voting shares of a company, those shares do not carry any voting rights unless the shares are granted such rights, in a shareholder referendum, by a majority of all disinterested shares entitled to vote. Id. § 13.1-728.3. Disinterested shares consist of all shares with voting power, excluding

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[2] As a preliminary matter, Tyson claims, based on *West Lynn Creamery, Inc. v. Healy*, 129 L. Ed. 2d 157, 114 S. Ct. 2205 (1994), that it is appropriate for us to consider the constitutionality of the relevant Commonwealth statutes as a group rather than examining the constitutionality of each statute standing alone. Healy does not directly support Tyson's contention, as that case addressed the constitutionality of a single pricing order, i.e., a single integrated scheme consisting of two parts, and not four distinct statutes enacted at different times and having multiple applications. However, we, like the district court, will assume for purposes of this discussion that we may consider the four unintegrated statutes as an integrated unit and judge them as a scheme in assessing their constitutionality.

We note that, on appeal, Tyson has not challenged any of the four statutes individually.

those that are owned by the acquiring person, an officer of the target corporation, or an employee of the target corporation who is also a director. Id. § 13.1-728.1. The target corporation may set a record date on which it is determined which shares are interested and which are entitled to vote in the control share referendum. See id. § 13.1-660.

The second statute in question is the Affiliated Transactions Act, Va. Code Ann. §§ 13.1-725 to -727.1, which prohibits certain transactions (such as mergers, share exchanges, sales of assets, and dissolution) between a corporation and an interested shareholder for a period of three years following the date on which the interested shareholder becomes an interested shareholder, unless the transaction is approved by a majority of the disinterested directors and by two-thirds of the voting shares other than those beneficially held by the interested shareholder. Id. §§ 13.1-725.1, 13.1-726. The statute contains further restrictions on affiliated transactions occurring after the three-year point. See id. § 13.1-725.1.

The third statute at issue, the Poison Pill Statute, Va. Code Ann. § 13.1-646, allows a corporation to give shareholders certain rights or options to purchase, on favorable terms, shares in the corporation. The rights take effect upon the occurrence of a specified event, such as the acquisition by one shareholder of a certain percentage of the company's stock. Such rights may be issued discriminatorily, i.e., may be withheld from designated shareholders or groups of shareholders. The directors of the corporation are required to exercise their good faith business judgment when granting such rights.

Finally, the fourth statute, the Business Judgment Statute, Va. Code Ann. § 13.1-690, establishes a standard of care for directors in fulfilling their duties to the corporation. The statute provides that "[a] director shall discharge his duties as a director . . . in accordance with

his good faith business judgment of the best interests of the corporation." Id. § 13.1-690(A). The director is entitled to rely on information presented to him or her by specified individuals when the director believes in good faith that the information is competent and reliable, and as long as the director does not have knowledge of information that would make reliance unwarranted. Id. §13.1-690(B).

A. Williams Act Preemption

There is a strong presumption against federal preemption of state law. See *Jiminez v. BP Oil, Inc.*, 853 F.2d 268, 271 (4th Cir. 1988), cert. denied, 490 U.S. 1011 (1989) (quoting *Tousley v. North Am. Van Lines, Inc.*, 752 F.2d 96, 101 (4th Cir. 1985)). A state law is preempted by a federal statute only if (1) Congress clearly expresses an intention to do so, (2) it is impossible to comply with both the federal and the state laws, or (3) the state law "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *CTS Corp. v. Dynamics Corp. of Am.*, 481 U.S. 69, 78-79, 95 L. Ed. 2d 67, 107 S. Ct. 1637 (1987) (quoting *Hines v. Davidowitz*, 312 U.S. 52, 67, 85 L. Ed. 581, 61 S. Ct. 399 (1941)). Because Congress did not clearly express its intent to preempt state law in the Williams Act, see *Edgar v. MITE Corp.*, 457 U.S. 624, 631, 73 L. Ed. 2d 269, 102 S. Ct. 2629 (1982) (plurality op.), and Tyson does not attempt to argue that it would be impossible to comply with both the Williams Act and any or all of the Virginia statutes, we will find the statutes at issue to be preempted only if the Virginia laws serve as an obstacle to the objectives of Congress embodied in the Williams Act.

The Williams Act, 15 U.S.C. §§ 78m(d)-(e) and 78n(d)-(f), was passed in 1968 as an amendment to the Securities Exchange Act of 1934, in response to an increase in the frequency of hostile tender offers. *CTS*, 481

U.S. at 79. The Act requires an entity which has acquired more than five percent of a class of securities to disclose certain information, including its plans for the target company, within ten days of the acquisition. 15 U.S.C. § 78m(d)(1); see also *CTS*, 481 U.S. at 79-80. In addition, the Williams Act establishes a set of procedural rules intended to regulate the process of tender offers. The Williams Act is meant to protect investors by placing them "on an equal footing with the takeover bidder." *CTS*, 481 U.S. at 82 (quoting *Piper v. Chris-Craft Indus., Inc.*, 430 U.S. 1, 30, 51 L. Ed. 2d 124, 97 S. Ct. 926 (1977)); see also *IU Int'l Corp. v. NX Acquisition Corp.*, 840 F.2d 220, 222 (4th Cir. 1988), adopted en banc, 840 F.2d 229 (4th Cir. 1988) (per curiam). While the Williams Act governs the process of tender offers, it leaves to the states the power to regulate substantive matters of corporate governance. See *CTS*, 481 U.S. at 85-86.

Tyson contends that the Williams Act has as an additional purpose the maintenance of a level playing field between a bidder and its target in the tender offer situation. Tyson argues that by providing target management with an advantage in takeovers, the Virginia statutes controvert the purpose of the Williams Act and are thus preempted. See *Edgar*, 457 U.S. at 633-34 (plurality op.) (finding that an Illinois statute was preempted by the Williams Act, largely because the state statute favored management over bidders to the shareholders' detriment).

However, while we have pointed out that "the Williams Act is designed to maintain neutrality between bidder and target," *IU Int'l*, 840 F.2d at 222, Tyson's argument focusses on an ancillary purpose of the federal statute. Neutrality between bidders and target management is but an incidental result of the broader purpose of the Williams Act to protect investors. See e.g., *Hyde Park Partners, L.P. v. Connolly*, 839 F.2d 837, 849-50 (1st Cir. 1988)

("Neutrality between management and bidder is the means to the end of investor protection, rather than the objective itself. . . . Protection of management that is incidental to protection of investors does not per se conflict with the purpose or purposes of the Williams Act." (discussing *CTS*, 481 U.S. 69)). The Supreme Court has stated that the Williams Act's "policy of evenhandedness does not go . . . to the purpose of the legislation . . . . Neutrality is, rather, but one characteristic of legislation directed toward a different purpose—the protection of investors," *Piper*, 430 U.S. at 29; "The sole purpose of the Williams Act was the protection of investors who are confronted with a tender offer," *id.* at 35.

In addition, although Congress "expressly disclaimed an intention [in the Williams Act] to provide a weapon for management to discourage takeover bids . . . . ," *IU Int'l*, 840 F.2d at 222 (quoting *Rondeau v. Mosinee Paper Corp.*, 422 U.S. 49, 58, 45 L. Ed. 2d 12, 95 S. Ct. 2069 (1975)), Congress did not forbid the result that Virginia has achieved with the statutory scheme in the instant case. The fact that Congress, when it enacted the Williams Act, did not intend to create an advantage for target management in the takeover situation, does not necessarily mean that Congress meant to prevent the states from allowing management an advantage which is not unfair to investors. As the Seventh Circuit stated in *Amanda Acquisition Corp. v. Universal Foods Corp.*, 877 F.2d 496 (7th Cir.), cert. denied, 493 U.S. 955 (1989),

> There is a big difference between what Congress enacts and what it supposes will ensue. Expectations about the consequences of a law are not themselves law. To say that Congress wanted to be neutral between bidder and target—a conclusion reached in many of the Court's opinions—is not to say that it also forbade the states to favor one of these sides. . . . Nothing in the Williams Act says that

> the federal compromise among bidders, targets' managers, and investors is the only permissible one.

Id. at 503 (citation omitted).

The means by which the Williams Act achieves its purpose of protecting investors is by requiring disclosure of information in order to allow shareholders to make an informed decision and to prevent coercion in the tender offer context; Tyson has not shown that the Virginia statutes controvert the purpose of the Williams Act by removing protection from investors, for example by keeping information from the shareholders. In fact, Tyson has not shown that the shareholders in this case were deprived of any relevant information. The goal of neutrality between bidder and target, emphasized by Tyson, is not in itself so central to the purpose of the Williams Act that the Act should be held to preempt a group of state statutes that regulate the balance between a target and a bidder, but do not disadvantage the shareholders or prevent them from gaining access to pertinent information.

Tyson further asserts that the Williams Act preempts the Virginia statutes because the Virginia statutory scheme does not provide a bidder with a "meaningful opportunity for success" in effecting a hostile takeover. The "meaningful opportunity for success test" has been used by several district courts to assess whether state statutes are preempted by the Williams Act. See, e.g., *BNS, Inc. v. Koppers Co., Inc.*, 683 F. Supp. 458, 469 (D. Del. 1988) ("Even statutes with substantial deterrent effects on tender offers do not circumvent Williams Act goals, so long as hostile offers which are beneficial to target shareholders have a meaningful opportunity for success."); *West Point-Pepperell, Inc. v. Farley, Inc.*, 711 F. Supp. 1096, 1102 (N.D. Ga. 1989); *RP Acquisition Corp. v. Staley Continental, Inc.*, 686 F. Supp. 476, 482 (D. Del. 1988). Tyson argues that if the Virginia statutes do not allow for a meaningful opportunity of Tyson's success, they frustrate the purposes of the Williams Act.

We, like the district court, reject the meaningful opportunity for success test. As we stated above, the purpose of the Williams Act is to protect independent investors from bidders and management by ensuring that the investors have access to information. The statute does not, however, have as an independent purpose the creation of an environment for bidders that is conducive to takeover. Tyson attempts to use the "meaningful opportunity for success" test to shift the focus of the Williams Act from protection of investors to protection of bidders. However, the Williams Act is simply not designed to protect a company in Tyson's position; "the Williams Act does not create a right to profit from the business of making tender offers." *Amanda,* 877 F.2d at 504-05.

The four Virginia statutes may work to give target management an advantage in the tender offer context. The preemption question we address here, however, is whether Virginia's decision to allow management access to a set of defensive mechanisms in the takeover situation frustrates the Williams Act's goal of investor protection. We hold that it does not.

B. Commerce Clause

We now turn to Tyson's Commerce Clause argument. Tyson claims that the Virginia statutory scheme violates the Commerce Clause both because (1) it discriminates against interstate commerce and is not justified by a valid state purpose other than economic protectionism, and (2) it imposes a burden on interstate commerce that is excessive in relation to the local benefits served by the regulation.

In CTS, the Supreme Court held that an Indiana statute very similar to the Control Share Act in the instant case did not discriminate against interstate commerce, because "it has the same effects on tender offers whether

or not the offeror is a domiciliary or resident of Indiana. Thus, it 'visits its effects equally upon both interstate and local business.'" *CTS*, 481 U.S. at 87 (quoting *Lewis v. BT Inv. Managers, Inc.*, 447 U.S. 27, 36, 64 L. Ed. 2d 702, 100 S. Ct. 2009 (1980)). Since both residents and non-residents had access to the commodities defined by Indiana state law, there was no discrimination, *CTS*, 481 U.S. at 87, even though many tender offers might be launched by out-of-state businesses, and the burden of the state law might fall on those companies, *id.* at 88. In addition, the Supreme Court pointed out that the fact that the Indiana Act might limit the number of successful tender offers did not change the Commerce Clause analysis in any substantial way. *Id.* at 93.

Similarly, in Amanda, the Seventh Circuit held that an affiliated transactions statute even more restrictive than the one in the instant case did not violate the Commerce Clause, because it did not regulate or forbid interstate transactions and did not make distinctions based on the domicile of the bidder. 877 F.2d at 506. The court stated that although the Wisconsin law might make a buyer less willing to buy, or might lower the bid, other corporate laws also had that effect, and such a result did not necessarily lead to a Commerce Clause violation. Id.

The group of statutes at issue here regulates only Virginia corporations, and treats in-state and out-of-state tender offerors exactly the same. Anyone can attempt the takeover of a Virginia corporation, and a Virginia bidder confronts the same difficulties as an out-of-state bidder. There is simply no evidence of discrimination among bidders. Tyson nevertheless contends that, even if the statutes are not facially discriminatory, they discriminate against interstate commerce by making it extremely difficult to gain control of a Virginia corporation and thereby "hoarding" a local resource. See, e.g., *C & A Carbone, Inc. v. Town of Clarkstown, N.Y.*, 128 L. Ed. 2d 399,

114 S. Ct. 1677 (1994) (discrimination against interstate commerce found where a flow control ordinance required all nonhazardous solid waste within a town to be processed at a local processing facility, thus hoarding waste for that facility). However, in the instant case, no commodity is being hoarded by Virginia. Although they increase the difficulty or expense of gaining control of a Virginia corporation, the statutes in the instant case do not erect a complete ban on the control of such corporations. Tyson has simply not established that the statutes at issue discriminate against interstate commerce.

Second, Tyson claims that the Virginia scheme is unconstitutional under the Commerce Clause, because the statutes impose a burden on interstate commerce which exceeds their putative local benefits. See *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142, 25 L. Ed. 2d 174, 90 S. Ct. 844 (1970). There has been some controversy since the Supreme Court's decision in CTS as to whether the balancing test described in Pike is to be used in a situation such as the instant one. See *Amanda*, 877 F.2d at 505; see also *CTS*, 481 U.S. at 95-96 (Scalia, J., concurring). However, even assuming that the Virginia statutes impose some incidental burden on interstate commerce, we find the burden to be outweighed by the interest of Virginia in regulating its corporations. As the district court pointed out, Virginia is permitted to determine that hostile takeovers can be detrimental to Virginia corporations, and it may regulate takeovers accordingly. In addition, it is significant for the Commerce Clause analysis that Virginia's "regulation of corporate governance is regulation of entities whose very existence and attributes are a product of state law." *CTS*, 481 U.S. at 89. Although the laws that states enact to regulate their corporations necessarily affect interstate commerce,

> it . . . is an accepted part of the business landscape in this country for States to create corporations, to prescribe their powers, and to define the rights that

> are acquired by purchasing their shares. A State has an interest in promoting stable relationships among parties involved in the corporations it charters, as well as in ensuring that investors in such corporations have an effective voice in corporate affairs.

Id. at 91. We do not find that the burden imposed on interstate commerce by Virginia's statutes is "clearly excessive," see *Pike*, 397 U.S. at 142, to the potential local benefits of the statutory scheme.

Virginia has provided both residents and nonresidents with equal access to takeovers. The Commonwealth has a clear interest in regulating the relationships that affect the corporations that are located within its territory and are a product of its own laws. We conclude that the Virginia statutes at issue do not violate the Commerce Clause, because they do not discriminate against interstate commerce, and to the extent that they burden interstate commerce, the burden is justified by the legitimate interest of the Commonwealth in regulating its corporations.

III. The Business Judgment Statute

In its next assignment of error, Tyson challenges the district court's finding that the Virginia Business Judgment Statute, Va. Code Ann. § 13.1-690 ("§ 690"), allows an inquiry only into the processes employed by corporate directors in making their decisions regarding a takeover, and not into the substance of those decisions. Pursuant to that interpretation, the district court denied Tyson access during discovery to the substantive content of the materials used by the WLR Board in responding to Tyson's takeover attempt.

A. Applicability of § 690

Tyson first challenges the district court's finding that § 690 applies to Tyson's claims against the directors on the WLR Board. Tyson argues that in certain situations, the statutory standard for judging director activity in Vir-

ginia embodied in § 690 should be abandoned in favor of the Virginia common law standard of duty of loyalty. Tyson claims that two such situations existed in the instant case: (1) a conflict of interest was presented on the target board of directors, and (2) the directors were sued for an injunction rather than for damages. The district judge rejected Tyson's arguments, finding that § 690 provides the exclusive standard by which director actions are measured in Virginia in a case such as the instant one. We agree.

The Virginia Code contains a statutory standard of care for directors, which applies to all aspects of a Board's actions in responding to a tender offer. For example, the Code expressly provides that actions of directors with respect to issuing rights or options for the purchase of shares of a corporation are subject to review under the standard articulated in § 690. See Va. Code Ann. § 13.1-646(B). Similarly, the Code provides that conduct concerning affiliated transactions, see id. § 13.1-727.1, as well as transactions involved in control share acquisitions, see id. § 13.1-728.9, are subject to § 690. In other words, actions taken by directors in responding to tender offers are explicitly made subject to § 690 standards by the Virginia Code, thereby foreclosing reliance on common law. See *Higgins v. Bowdoin*, 238 Va. 134, 140, 380 S.E.2d 904, 908 (1989) (holding that a statute that applied to a certain set of circumstances supplanted the contrary common law in that situation).

Further, Tyson has not provided us with any convincing reasons for which § 690 should not apply in the instant case. Tyson's first argument, that a conflict of interest was present on the WLR Board which should preclude the application of § 690 to Tyson's claims and allow recourse to the common law, is without merit. Virginia law contains a statutory provision which addresses director conflicts of interest arising from hostile takeover situations. See Va. Code Ann.

§ 13.1-691; see also *Izadpanah v. Boeing Joint Venture*, 234 Va. 81, 412 S.E.2d 708, 709 (1992). The Virginia Code provides:

> A. A conflict of interests transaction is a transaction with the corporation in which a director of the corporation has a direct or indirect personal interest. . . .
>
> . . . .
>
> B. For the purposes of this section, a director of the corporation has an indirect personal interest in a transaction if:
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> > 1. Another entity in which he has a material financial interest or in which he is a general partner is a party to the transaction; or
> >
> > 2. Another entity of which he is a director, officer or trustee is a party to the transaction and the transaction is or should be considered by the board of directors of the corporation.

Va. Code Ann. § 13.1-691. Tyson has failed to show that any WLR Board member had a conflict of interest as defined in § 13.1-691, and even if Tyson could prove such a conflict, Tyson's claim would be governed by the statutory standard in § 13.1-691, not by Virginia common law. Tyson's attempt to escape from the statutory standard of care for directors is simply unavailing in the face of the statutory scheme in Virginia.

We also reject Tyson's second argument, that § 690 does not apply when directors are sued for injunctions. Section 690 states that "[a] director is not liable for any action taken as a director, or any failure to take any action, if he performed the duties of his office in compliance with this section." Va. Code Ann. § 13.1-690(C). Tyson claims that the purpose of § 690 is to protect directors only from personal liability, and argues that it would be more appropriate to resort to common law

standards to assess director behavior in injunctive actions. However, § 690 by its terms establishes "standards of conduct" for the director of a corporation in "discharging his duties as a director;" the provision does not merely shield from liability a director who has complied with the standard, once he is sued. It is clear from the language of the statute that the articulated standard is meant not only to provide a way in which to assess a director's personal liability, but also to establish a benchmark against which a director's actions shall be measured in other contexts. See Daniel T. Murphy, The New Virginia Stock Corporation Act: A Primer, 20 U. Rich. L. Rev. 67, 107 (1985). In addition, the references to § 690 in the provisions of the Virginia Code dealing with various aspects of tender offers are pervasive. In the face of the clear language of the statute dictating the broad application of § 690, Tyson has pointed to no Virginia law to support its contention that § 690 does not apply to injunctive actions against corporate directors. We therefore find that § 690 applies to director behavior in actions such as the instant one.

Virginia has provided for a statutory standard to govern the duty of directors in tender offer situations. Tyson has failed to convince us that there is any reason not to use that standard in the instant case. We find that the district court was correct in deciding that, in the Commonwealth of Virginia, the actions of directors in tender offer situations such as the instant one must be examined under § 690.

B. Discovery Rulings

We next turn to Tyson's challenge to the district court's limitation of discovery under Federal Rule of Civil Procedure 26. The district court denied Tyson access to the information and recommendations that were given to the WLR Board by its advisors, pursuant to the court's finding that, under the applicable Virginia law, the information sought to be discovered by Tyson was not "reasonably calculated to lead to the discovery of admissible evi-

dence" and was therefore not discoverable under Federal Rule of Civil Procedure 26(b)(1). To the extent that the district court's decision rests on issues of statutory interpretation, we review the court's decision de novo, see *C.G. Willis, Inc. v. The Spica*, 6 F.3d 193, 196 (4th Cir. 1993) (citing *McDermott Int'l, Inc. v. Wilander*, 498 U.S. 337, 356, 112 L. Ed. 2d 866, 111 S. Ct. 807 (1991)); however, we review only for abuse of discretion the district court's rulings regarding the scope of discovery, see *Ardrey v. United Parcel Service*, 798 F.2d 679, 682 (4th Cir. 1986), cert. denied, 480 U.S. 934 (1987).

Federal Rule of Civil Procedure 26 provides, in relevant part:

> (b) Discovery Scope and Limits. Unless otherwise limited by order of the court in accordance with these rules, the scope of discovery is as follows:
>
> > (1) In General. Parties may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action, whether it relates to the claim or defense of the party seeking discovery or to the claim or defense of any other party, including the existence, description, nature, custody, condition, and location of any books, documents, or other tangible things and the identity and location of persons having knowledge of any discoverable matter. The information sought need not be admissible at the trial if the information sought appears reasonably calculated to lead to the discovery of admissible evidence.

Fed. R. Civ. P. 26. Thus, under Rule 26, even information that is not admissible at trial is discoverable, as long as it is "relevant to the subject matter involved in the pending action." Id. (b)(1). The parties in the instant case agree that relevance under Rule 26 must be determined by reference to the substantive law which forms the basis of their claims and defenses. The district court

made its discovery rulings pursuant to its interpretation of the Virginia Business Judgment Statute, Va. Code Ann. § 13.1-690. Section 690 provides as follows:

> § 13.1-690. General standards of conduct for director.—A. A director shall discharge his duties as a director, including his duties as a member of a committee, in accordance with his good faith business judgment of the best interests of the corporation.
>
> B. Unless he has knowledge or information concerning the matter in question that makes reliance unwarranted, a director is entitled to rely on information, opinions, reports or statements, including financial statements and other financial data, if prepared or presented by:
>
> 1. One or more officers or employees of the corporation whom the director believes, in good faith, to be reliable and competent in the matters presented;
>
> 2. Legal counsel, public accountants, or other persons as to matters the director believes, in good faith, are within the person's professional or expert competence; or
>
> 3. A committee of the board of directors of which he is not a member if the director believes, in good faith, that the committee merits confidence.

(emphasis added). The district court held that under the standard articulated in § 690, only the good faith business judgment of the directors was at issue in Tyson's claims, and the rationality vel non of the decision ultimately reached by the WLR Board was not relevant. The district court thus permitted Tyson to inquire into the procedures followed by the WLR directors during their investigation of Tyson's offer that indicated whether or not they were considering the offer in good faith, but did

not allow Tyson access to the actual substantive information that was used by the directors in making their decision regarding the offer.

We find that the district court did not abuse its discretion in limiting discovery in the instant case. First, it is clear from the language of § 690 that the actions of a director are to be judged by his or her good faith in performing corporate duties, and not by the substantive merit of the director's decisions themselves. Tyson concedes that good faith is the relevant standard under § 690. However, according to Tyson, although § 690 itself does not focus on whether a director's decision is substantively correct, knowledge of the substantive content of the information that was available to the director is necessary in order to determine whether the decision was made in good faith. Tyson claims that a litigant cannot prove a director's lack of good faith without having access to all of the information on which the director relied.

In essence, Tyson hopes to prove lack of good faith in the instant case by showing that, based upon the substantive information received by the WLR Board, the Board should have reached a different result. However, that argument imports an aspect into the Virginia standard of director conduct that is not part of Virginia law. It reduces, and nearly eliminates, the ability to rely, in good faith, on experts. Whether a different person would have come to a different conclusion given the information that a director had before him is simply irrelevant to the determination of whether a director in Virginia has acted in good faith in fulfilling his corporate duties.

In fact, it is precisely such a comparison between a director and the hypothetical reasonable person that the Virginia legislature explicitly chose to reject when it enacted § 690. The Model Business Corporation Act ("the Model Act"), which embodies the traditional formulation of the business judgment rule, provides that:

> (a) A director shall discharge his duties as a director, including his duties as a member of a committee:
>
> (1) in good faith;
>
> (2) with the care an ordinarily prudent person in a like position would exercise under similar circumstances; and
>
> (3) in a manner he reasonably believes to be in the best interests of the corporation.

Model Act § 8.30. The business judgment rule contained in the Model Act, like § 690, is based upon a director's good faith. By referring to an "ordinarily prudent person" and the director's "reasonable belief" concerning the corporation's best interests, however, the Model Act makes clear that one of the ways in which a litigant may prove that a director did not exercise good faith is by showing that a director's decision is irrational, i.e., that the decision does not comport with what a reasonable person would do under similar circumstances.

Section 690, however, contains no reference to the "reasonable person." In fact, the Virginia legislature expressly chose to reject the Model Act standard:

> [Section 690], especially subsection A, is significantly different from the Model Act's treatment of the same subject in § 8.30. . . .
>
> . . . .
>
> The term "reasonable" is intentionally not used in the standard. It thereby eliminates comparison of the conduct in question with the idealized standard and removes the question of how great a deviation from this idealized standard is acceptable.

Virginia Corporation Law with Commentaries and Rules 197-98 (1992 ed.) (Joint Bar Committee Commentary); *see also* Murphy, 20 U. Rich. L. Rev. at 108 (Under § 690, "[t]he trier of fact need only find good

faith and determine whether the conduct in question was a product of the director's own business judgment of what is in the best interest of the corporation. The director's conduct or decision is not to be analyzed in the context of whether a reasonable man would have acted similarly."); id. ("The statute . . . may . . . protect the utterly inept but well-meaning, good faith director."). Directors' actions in Virginia are not to be judged for their reasonableness, and we, like the district court, reject Tyson's attempt to inject such a standard into Virginia law. We thus hold that the district court did not abuse its discretion in denying Tyson permission to discover the substantive content of the recommendations made to the WLR Board, because pursuant to the governing Virginia law, that information was not relevant under Federal Rule of Civil Procedure 26(b)(1).[3]

In addition, we do not believe that the district court's ruling restricting discovery prevented Tyson from being able to determine whether the actions of the Board in the instant case were in good faith. As the district judge stated,

> the means of addressing good faith for Tyson must be in keeping with the procedural thrust of the statute. Neither the statute nor the Magistrate Judge's order would necessarily preclude, for instance, inquiry into the identity and qualifications of any sources of information or advice sought which bear on the decision reached, the circumstances surround-

[3] We also note that it was within the district court's discretion to take into account the potential harm to WLR in allowing discovery into intimate details concerning WLR's business. See Fed. R. Civ. P. 26(b)(2) (the court may limit discovery where "the burden or expense of the proposed discovery outweighs its likely benefit"). There are clear and compelling reasons for refusing to allow access to the internal operating information of a target corporation by a competitor who is in the process of attempting a hostile takeover. The potential damage to the target company is apparent.

> ing selection of these sources, the general topics (but not the substance) of the information sought or imparted, whether advice was actually given, whether it was followed, and if not, what sources of information and advice were consulted to reach the decision in issue. In short, the statute permits inquiry into the procedural indicia of whether the directors resorted in good faith to an informed decisionmaking process.

WLR Foods, Inc. v. Tyson Foods, Inc., 857 F. Supp. 492, 494 (W.D. Va. 1994). Tyson was given access to various records bearing on the way in which the WLR Board made decisions. The redacted copies of Board meetings, while they do not reveal the substantive advice given to the Board, make clear the subjects that were discussed at the Board meetings. Tyson knew when advisors were hired, and who those advisors were. Tyson discovered which issues the WLR Board considered in determining whether to reject Tyson's offer. In sum, under the district court's interpretation of § 690, Tyson was given an opportunity to determine whether the WLR Board had acted in good faith.

The case of *Sandberg v. Virginia Bankshares, Inc.*, 891 F.2d 1112 (4th Cir. 1989), rev'd on other grounds, 501 U.S. 1083 (1991), does not, as Tyson contends, dictate a contrary result. In Sandberg, we upheld a jury verdict finding that certain directors, in approving a merger, had failed to act in good faith under § 690. The bank in that case retained no independent investment advisor in order to assess a fair value for its stock, and merely issued a two-sentence statement recommending acceptance of an offer. See *id.* at 1117. Although the directors had consulted an investment consultant and relied on an executive committee, we stated that

> the case against the directors is that they merely rubberstamped everything placed before them by

> Bankshares. The evidence fully supports a view that the directors exercised no independent judgment whatsoever with regard to the interests of the minority stockholders and consequently, was sufficient to support the jury's finding of lack of good faith.

Id. at 1123.

Tyson argues that if the court in Sandberg had restricted the jury's inquiry to the processes by which the directors made their decision, the jury would not have been able to make a finding that the directors had merely rubberstamped the information before them. However, as we stated above, we do not believe that it would be impossible for a jury to find that directors had merely rubberstamped a proposal if the jury had access to information regarding the advisors consulted by the directors, their qualifications, how they were selected, the general topics on which they advised, and whether the advice was followed. Thus, contrary to Tyson's assertions, access to the type of information that would be made available under our interpretation of § 690 also would have permitted a finding of lack of good faith in Sandberg.

We find the district court's decision limiting discovery in the instant case to be a sound one under Virginia law. Knowledge of the substantive advice given to the WLR Board was not reasonably calculated to lead to a determination regarding good faith as defined in § 690, and the district court acted within its discretion in limiting Tyson's access to that information.

C. Factual Findings

Finally, Tyson attacks the factual findings of the district court on the issue of the WLR Board's good faith in rejecting Tyson's takeover offer. We reverse such findings only if clearly erroneous. *Diamond Star Bldg. Corp. v. Freed*, 30 F.3d 503, 506 (4th Cir. 1994).

Tyson asserts that, based on the evidence presented in the instant case, i.e., even considering only the processes employed by the WLR Board in considering Tyson's offer, the district court clearly erred in finding that the WLR directors did not breach their duty of good faith to the shareholders by rejecting Tyson's offer and adopting defensive measures. Tyson claims that its offer was rejected as early as the first time that Don Tyson communicated with WLR director Keeler. Yet, although Keeler stated that WLR was "not for sale" when he was first approached by Don Tyson, WLR's management said at the same time that it would listen to Tyson's proposal. In fact, the WLR Board repeatedly acknowledged that although it had not put the company up for sale and did not wish to sell, the Board was required to consider Tyson's offer. WLR simply did not, as Tyson contends, reject the offer before considering the matter with the help of experts. The WLR Board had several extended meetings regarding Tyson's takeover offer and spent time and financial resources on gathering information from informed advisors, who Tyson does not argue were unreliable or incompetent. The district court found, based on an examination of the record, that the WLR Board had acted in good faith, and we are not inclined to reverse its finding.

IV. Control Share Referendum

Finally, we reach Tyson's last challenge to the rulings below. After Tyson acquired the requisite percentage of WLR's stock to trigger a loss of voting rights under the Virginia Control Share Act, Va. Code Ann. §§ 13.1-728.1 to -728.9, a shareholder referendum was scheduled to determine whether Tyson's shares would reacquire any voting rights. Under the Control Share Act, Tyson needed a majority of the votes of the disinterested shareholders in order to gain such rights. The control share referendum was held on May 21, 1994, and was defeated. Tyson

contends that by virtue of certain defensive measures taken by the WLR Board at its meeting on February 4, 1994, interested parties were permitted to vote in the control share referendum, thereby skewing the outcome of the vote. On appeal, Tyson contests the district court's finding that the challenged shares were not interested for purposes of the vote. Factual findings of the district court will be reversed only if they are clearly erroneous. *Freed*, 30 F.3d at 506.[4]

Interested shares may not be counted in a vote under the Control Share Act. Va. Code Ann. §13.1-728.3(B). Interested shares are defined by the Control Share Act as shares held by the following: (1) the acquiring person in a control share acquisition, (2) an officer of the target corporation, or (3) an employee of the target corporation who is also a director of that corporation. Id. §13.1-728.1. In addition, shares are interested if they are held by the "associates" of one of the above persons, who are defined as:

> (i) any other person who directly or indirectly controls, or is controlled by or under common control with, any such person or who is acting or intends to act jointly or in concert with any such person in connection with the acquisition of or exercise of beneficial ownership over shares; (ii) any corporation or organization of which any such person is an officer, director or partner or as to which any such person performs a similar function; (iii) any other person having direct or indirect beneficial ownership of ten percent or more of any class of equity securities of any such person; (iv) any trust or estate in which any such person has a beneficial interest or as to which any such person serves as trustee or in

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[4] In the district court, Tyson also challenged the record date that was set by the WLR Board in order to determine which shares were interested for purposes of the vote. Tyson has not raised that issue on appeal.

> a similar fiduciary capacity; and (v) any relative or spouse of any such person, or any relative of such spouse, any one of whom has the same residence as any such person. . . .

Id. The status of the shares is to be determined as of the record date. Id. § 13.1-728.3(B).

Tyson claims that the votes of the four directors who resigned as employees prior to the record date for the May 21, 1994 vote, Charles Wampler, William Wampler, Herman Mason, and George Bryan, should not have been counted in the control share referendum, because their resignations were not genuine.[5] According to Tyson, since the four men continued to be employees of WLR, their shares were interested for purposes of the control share referendum. See id. § 13.1-728.1 (shares of directors who are also employees are interested). Further, Tyson claims that simply subtracting the votes of the four directors and their associates from the final result to determine what the referendum count would have been if the allegedly interested shares had not been cast does not suffice as a remedy, because other voters were "intimidated" by the fact that the directors were planning to vote against Tyson and therefore voted the same way. In other words, Tyson claims that the entire result of the referendum was tainted by allowing the purportedly interested parties to vote.[6]

The Virginia statute is clear that the status of a share as interested should be determined as of the record date.

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[5] WLR readily admits that the four directors resigned as employees of the company in order to be able to cast their votes in the control share referendum.

[6] Tyson received 3,152,830 votes out of 10,896,672 shares eligible to vote. Tyson must therefore argue that the entire referendum was tainted, because even if all of the 1,395,930 shares challenged by Tyson were counted in its favor, it would not prevail based only on those votes.

See id. § 13.1-728.3(B). Therefore, if the four directors were no longer employees on the record date, they were entitled under the statute to cast their votes in the referendum. The district court performed an analysis of the functions and capacities of each of the four directors individually to determine whether they had actually ceased to function as employees on the record date. He found that, even before the record date for the referendum, the four directors in question had minimal involvement with the daily operations of WLR. Charles Wampler did not report to anyone at WLR. He signed no checks for the company, and did not have authority to direct WLR employees. He gave up his salary when he resigned as an employee. Similarly, William Wampler had drawn no salary from WLR since his resignation on February 4, 1994, had no office or secretary at the company, and did not direct other employees. Herman Mason also did not collect a salary as of April 14, 1994, could not hire or fire workers for WLR, had no secretary at the company, and other than performing his functions as a director, he served WLR only by giving advice to Keeler, which Keeler was free to follow or to disregard. Finally, George Bryan no longer received a salary as of February 4, 1994, and had not been instrumental in WLR's operations since the 1970s. In fact, he had been ill since before February 4, 1994, and had ceased to perform functions for WLR.

The district judge concluded, after his careful analysis of the functions and positions of the four directors, that none of the four was working as an employee of WLR on the record date. He also found that the health benefits which the four directors received were retirement benefits, as opposed to ongoing compensation for employee services. Although Tyson has mounted a broad challenge to the district judge's findings on the employee status of the four directors, Tyson has not pointed to any specific facts tending to show that the determination that the directors ceased to function as employees was incor-

rect. The district judge's factual findings regarding the status of the four directors, and his conclusion that they were no longer WLR employees as of the record date, are amply supported by evidence in the record.

Tyson also claims that the entire WLR Board should have been precluded from voting in the referendum, because its members worked with Keeler, an interested director,[7] in procuring the resignations of the four directors, and thus should have been considered his "associates" in the sense used in the Virginia Control Share Act. Tyson therefore argues that the Board members were owners of interested shares not entitled to vote in the referendum. However, Tyson's contention in this regard depends largely upon its claim that the resignations of the four directors were "sham" resignations procured by Keeler with the help of other Board members. Under the factual findings of the district judge, which are supported by the record, we do not accept Tyson's theory of a great conspiracy among the Board of Directors of WLR. The Board members were simply not Keeler's associates as defined by the Control Share Act, id. § 13.1-728.1. The members of the Board whom Tyson wishes to classify as "associates" of Keeler were legitimately entitled to vote in the control share referendum.

Finally, Tyson contends that certain other individuals functioned as officers of WLR, and thus should have been excluded from the referendum voting. See id. § 13.1-728.1 (shares of officers of issuing public corporations are interested). Tyson claims that these "officers" agreed to vote against Tyson in exchange for receiving benefits and perks. Although WLR did, in fact, grant benefits to some of the people identified by Tyson, we find Ty-

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[7] There is no dispute that Keeler, who was both an employee and a director of WLR, was not entitled to vote, see Va. Code Ann. § 13.1-728.1 (shares of director-employee are interested); his votes were not cast in the referendum.

son's challenge to their votes, also, to lack support in the record.

The shares of the four directors, as well as the shares of the other directors on the Board (excepting Keeler) were not interested, and they therefore were properly cast in the control share referendum. In addition, Tyson's contention that certain other individuals should be treated as officers and therefore not entitled to vote is without merit.

V. Conclusion

For the foregoing reasons, the judgment of the district court is AFFIRMED.

APPENDIX B

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF VIRGINIA
HARRISONBURG DIVISION

Civil Action No. 94-012-H

WLR FOODS, INC.,
Plaintiff,
v.
TYSON FOODS, INC.,
Defendant,
and
TYSON FOODS, INC. and WLR ACQUISITION CORP.,
Counterclaimants,
v.
WLR FOODS, INC., *et als.*,
Counterclaim-defendants.

December 6, 1994, Decided
December 6, 1994, FILED

MEMORANDUM OPINION

JUDGE JAMES H. MICHAEL, JR.

WLR Foods, Inc. ("WLR") filed a complaint seeking a declaratory judgment affirming the validity of certain Virginia statutes and certain of its actions taken in defending itself against a hostile takeover commenced by Tyson Foods, Inc. and WLR Acquisition Corp. ("Tyson"). Tyson filed a counterclaim attacking the defenses

undertaken by WLR in warding off the takeover attempt. Tyson included various counts asserting claims falling into three general categories: (1) the unconstitutionality of the Virginia statutory scheme regulating corporate takeovers; (2) the invalidity of certain actions undertaken by WLR pursuant to the Virginia Control Share Acquisitions Act ("Control Share Act"), Va. Code Ann. §§ 13.1-728.1 to 13.1-728.9 (Michie 1993); and (3) breaches of fiduciary duty by WLR's Board of Directors. This matter is now before the court for findings of fact and conclusions of law.

I.

All of the parties have vigorously and voluminously asserted their positions throughout this case. In getting to this point, the court has made three significant rulings. First, the court held that Va. Code Ann. § 13.1-690 (Michie 1993) ("Business Judgment Statute"), is a procedural rather than substantive statute requiring "good faith . . . to be measured by the directors' resort to an informed decisionmaking process, not by the rationality of the decision ultimately taken." *WLR Foods, Inc. v. Tyson Foods, Inc.*, 857 F. Supp. 492, 494 (W.D. Va. 1994). Next, the court denied Tyson's motion for a preliminary injunction seeking to prevent certain votes from being counted in the shareholder referendum held pursuant to the Control Share Act. *WLR Foods, Inc. v. Tyson Foods, Inc.*, 857 F. Supp. 496 (W.D. Va. 1994). Lastly, the court denied another Tyson motion for a preliminary injunction requesting the court to declare unconstitutional Virginia's statutory scheme regulating hostile tender offers. *WLR Foods, Inc. v. Tyson Foods, Inc.*, 861 F. Supp. 1277 (W.D. Va. 1994). These three rulings have addressed in some form all of the parties' claims and counterclaims, except for the claims and counterclaims relating to alleged breaches of fiduciary duty by WLR's directors.

After the court's most recent ruling, the parties agreed to submit the case for the court's decision based upon all

of the evidence previously presented plus supplemental affidavits. Most of the supplemental affidavits add little, except reiteration of points already addressed by other evidence. The affidavits submitted by WLR seem to focus upon clarifying the steps taken and the general advice received by WLR's Board of Directors in defending against Tyson's takeover bid. The supplemental affidavit of James Blair, general counsel of Tyson Foods and president of WLR Acquisition Corp., discloses that WLR agreed to acquire Cuddy Farms, Inc. ("Cuddy") on July 27, 1994. This transaction places approximately 10% of WLR stock in Cuddy's hands, and Cuddy has agreed to vote the stock in accordance with the directions of WLR's Board of Directors for a four year period. Tyson contends that this transaction was consummated for the purpose of defeating its attempt to takeover WLR. Based upon what Tyson contends is an excessive overpayment for Cuddy, Blair states that WLR is no longer worth $30 per share to Tyson. The Cuddy acquisition and the uncertainty and delay caused by this litigation have prompted Tyson to withdraw its tender offer. Blair's affidavit asserts, however, that Tyson stills desire to acquire all of WLR's outstanding shares. If this dispute ends favorably for Tyson, it intends to commence a new tender offer to acquire WLR.

II.

After reviewing all of the evidence submitted by the parties, including all of the supplemental affidavits, the objections to the affidavits, and the responses to the objections to the affidavits, the court sees no reason to alter any of its prior rulings in this case. As a result, the court adopts the findings of fact and conclusions of law contained in its three previous decisions, as supplemented herein.

Both sides seek a ruling concerning WLR's directors' exercise of their fiduciary duty.[1] A Virginia corpora-

[1] Because both sides request a ruling on this issue, and because Tyson's counterclaims are more specific than WLR's general re-

tion's directors and officers owe a duty of loyalty both to the corporation and to the corporation's shareholders. *Glass v. Glass*, 228 Va. 39, 321 S.E.2d 69, 74 (Va. 1984); *Adelman v. Conotti Corp.*, 215 Va. 782, 213 S.E.2d 774, 779 (Va. 1975). Tyson alleges that WLR breached its duty by undertaking the following measures in defending against Tyson's takeover attempt: (1) adoption of a discriminatory shareholder rights plan ("Poison Pill") and refusal to redeem it in the face of Tyson's tender offer; (2) adoption of lucrative severance agreements for senior officers to take effect in the event of a change in control of WLR ("Golden Parachutes"); (3) adoption of similar, less lucrative severance agreements for most WLR employees ("Other Parachutes"); (4) amendment of the bylaws setting the record date for any special meeting held pursuant to the Control Share Act as the date on which the acquiring person requests such a meeting ("Record Date Amendment"); (5) amendment of the bylaws to clarify that the Chairman and Vice Chairman of the Board are officers of the Board of Directors, rather than officers of WLR ("Officers Amendment"); and (6) resignation as employees of four directors for the purpose of voting in the control share referendum ("Resignations").

The court already has interpreted Va. Code § 13.1-690, which sets the standard for director conduct. See *WLR Foods, Inc. v. Tyson Foods, Inc.*, 857 F. Supp. 492 (W.D. Va. 1994). This statute applies to all of Tyson's challenges regarding the directors' fiduciary duty in defending against the takeover attempt.[2] Only if the

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quest that the court validate its actions, the court will address Tyson's counterclaims. Any request for relief by WLR relating to its director's fiduciary duty automatically is subsumed into the court's discussion.

[2] Regardless of any standard applicable in other jurisdictions, § 690 applies in Virginia to Tyson's challenges. Section 13.1-646(B) explicitly states that § 690 is the appropriate standard by which to assess director conduct related to the issuance or redemption

directors did not discharge their duty "in accordance with [their] good faith business judgment of the best interests of the corporation" will Tyson's challenges succeed.

The directors held a four and one-half hour meeting on January 28, 1994 to discuss the situation presented by Tyson's tender offer. At that meeting, they received independent legal advice from Wharton, Aldhizer & Weaver and Sullivan & Cromwell, and they received independent financial advice from Goldman, Sachs, & Co. and Wheat First Butcher & Singer (collectively, the "Advisors"). There is no dispute that the directors believed in good faith that the advice received was within the advisors' professional or expert competence. The advice received at that meeting concerned, inter alia, the legal and financial implications of Tyson's offer, whether to adopt a Poison Pill and what its terms should be, and whether to adopt Golden Parachutes. The advisors responded to several questions from the directors, no action was taken, and the directors were given various materials to review before the next meeting.

The next official meeting of the directors occurred on February 4, 1994, lasted over four hours, and was attended by all of the Advisors. At the meeting, the Advisors presented a comprehensive review of the financial details of Tyson's offer and concluded that the offer was inadequate. This presentation included discussion of WLR's recent past financial performance; important considerations taken into account in valuing WLR; the performance, ownership, and trading activity of WLR's com-

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of a Poison Pill. Furthermore, § 13.1-728.9 explicitly states that "with respect to any potential changes in control of any issuing public corporation," § 690 applies to "any action taken or not taken by directors." This plain statement by the Virginia legislature forecloses Tyson's argument that the less deferential standard formed in *Unocal Corp. v. Mesa Petroleum Co.*, 493 A.2d 946 (Del. 1985), applies because of the inherent conflict of interest which other courts have found to exist when directors defend against hostile takeover attempts.

mon stock; a summary of comments by research analysts regarding WLR; a comparison of WLR to other, similarly situated publicly traded companies; analysis of other recent acquisitions by Tyson; a detailed valuation of WLR and financial analysis at different offer prices; a summary of factors warranting Tyson's interest in acquiring WLR; analysis of several different merger scenarios incorporating numerous financial variables; and an examination of several alternatives to Tyson's offer.[3] The Advisors' Presentations were followed by additional presentations from some of WLR's officers. After questions and discussion by the directors, they voted unanimously to reject Tyson's $30 per share offer. Also at the February 4 meeting, in reliance upon advice given by the Advisors and WLR's Executive Compensation Committee, the directors enacted the Officers Amendment, the Record Date Amendment, the Golden Parachutes, the Other Parachutes, the Poison Pill, and post-retirement health insurance coverage for the four executives who resigned pursuant to Resigations.[4]

At a further meeting on March 11, 1994, the directors again heard detailed, updated presentations from the Advisors regarding the adequacy of Tyson's tender offer, focusing on most of the same general topics as those that were discussed at the February 4 meeting. After again receiving advice from the Advisors that Tyson's offer was inadequate, the directors decided unanimously that the offer was inadequate and recommended to WLR's shareholders that they not tender their shares to Tyson.

The record discloses that throughout this entire process, the directors had absolutely no knowledge or information making reliance upon the Advisors unwarranted, and Tyson presented no evidence that the directors ever re-

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[3] The court has reviewed in camera all of the information provided to WLR by the Advisors at this and other meetings.

[4] The four directors who were granted health insurance coverage did not participate in the vote on this resolution.

ceived any advice from anyone stating that Tyson's $30 per share offer was adequate or that any action taken was not in the best interests of the corporation. The evidence shows that in responding to Tyson's offer, the directors sought out and relied in good faith upon competent legal and financial advisors. Furthermore, based upon the record in this case, they did more than merely "rubberstamp" the Advisors' recommendations; they asked several questions of the Advisors and engaged in independent discussion of the merits of Tyson's offer. Between the January 28 and February 4 meetings, they were given detailed materials to examine in order to prepare themselves for the decisions that they would make. Based upon the record in this case, the directors' decisionmaking process provides a clear indication that their decisions were undertaken pursuant to their good faith business judgment of the best interests of the corporation.

Tyson contends that *Sandberg v. Virginia Bankshares, Inc.*, 891 F.2d 1112 (4th Cir. 1989), rev'd on other grounds 501 U.S. 1083, 115 L. Ed. 2d 929, 111 S. Ct. 2749 (1991), forecloses a finding of good faith by the directors. In Sandberg, the Fourth Circuit upheld a jury verdict finding a violation of § 13.1-690, stating: "The case against the directors is that they merely rubberstamped everything placed before them by Bankshares. The evidence fully supports a view that the directors exercised no independent judgment whatsoever . . . ." *Id.* at 1123. In that case, however, the directors who were liable under § 690 were directors of one of two subsidiaries merged by their parent company. Those directors were liable because they simply accepted the recommendation of the parent company's investment advisor, without retaining their own independent advisor to assess the fair value of the stock held by the subsidiary's minority shareholders. See *id.* at 1117. In contrast, WLR's directors engaged in a much more involved process in reaching their decisions and exercised their own independent judgment after receiving advice from their independent ad-

visors. Although it could be said that the directors in Sandberg had knowledge or information making reliance upon the parent company's advisors unwarranted, the same is not true of WLR's directors.

Tyson's reliance upon *Adelman v. Conotti Corp.*, 215 Va. 782, 213 S.E.2d 774 (Va. 1975), also is misplaced. In Adelman, the Virginia Supreme Court found a breach of fiduciary duty to the shareholders when the directors caused new shares to be issued to two of the directors in an effort to prevent a hostile party from gaining control of the corporation. See id. at 781. Tyson argues that Adelman supports its argument that the directors breached their fiduciary duty by interfering with the shareholder referendum held pursuant to the Control Share Act by arranging the Resignations and diluting the voting power of the disinterested shareholders. Adelman is distinguishable, however, in at least two ways. First, the directors did not cause WLR to issue any new shares, thus they did not dilute the shareholders' interests.[5] Secondly, and more importantly, the Resignations were undertaken by the four executives within their role as employees, not as directors. They did not use their powers as directors to do anything to the detriment of WLR's shareholders. Quite simply, in resigning as employees, they were not discharging any duties as directors. To the extent that Tyson alleges that the granting of post-retirement health insurance benefits indicates that the Resignations are shams, the court considers those benefits to be recognition for past contributions rather than compensa-

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[5] Even if it could be said that the Resignations diluted the relative strength of all other disinterested shares solely for the purpose of the shareholder referendum, no harm has been caused to the shareholders or to Tyson. Even ignoring the votes of the shares held by these four directors, the disinterested shareholders still voted overwhelmingly against Tyson. See *WLR Foods, Inc. v. Tyson Foods, Inc.*, 857 F. Supp. 496, 498 & n.4 (W.D. Va. 1994).

tion for current services. See *WLR Foods, Inc. v. Tyson Foods, Inc.*, 857 F. Supp. 496, 500-01 (W.D. Va. 1994).[6]

Based upon the record in this case, the decisionmaking process engaged in by WLR's directors demonstrate that their actions were taken in compliance with their good faith business judgment of the best interests of the corporation. As a result, Tyson's counterclaims alleging breaches of fiduciary duty must fail.

III.

The court adopts herein all of the findings of fact and conclusions of law expressed in its three prior rulings in this case. See *WLR Foods, Inc. v. Tyson Foods, Inc.*, 861 F. Supp. 1277 (W.D. Va. 1994); *WLR Foods, Inc. v. Tyson Foods, Inc.*, 857 F. Supp. 496 (W.D. Va. 1994); *WLR Foods, Inc. v. Tyson Foods, Inc.*, 857 F. Supp. 492 (W.D. Va. 1994). All of these rulings share one dominant theme—the court's refusal to usurp the power of Virginia's legislature. The remedy, if any, for an overly broad business judgment statute or statutes that impede hostile tender offers lies not with this court, but with the body responsible for crafting such laws.

This court's decision interpreting the statutes at issue rests upon their plain language, and not upon any policy considerations which the Virginia legislature is much better equipped than this court to weigh. This court will not advance a tortured construction of a statute simply to reach a particular result. That the Business Judgment Statute, for example, may appear to offer more protection

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[6] Tyson has alleged that the Resignations constitute a breach of fiduciary duty only because of their effect on the shareholder referendum held pursuant to Control Share Act. Tyson does not allege a breach of fiduciary duty arising from any employment benefits paid to any of these four directors after they no longer performed any real function for WLR, and the court expresses no opinion on such a claim.

for directors than do most or all analogous statutes in other states does not alter its plain language. Whether such extensive protection is good or bad for shareholders of Virginia corporations is a decision to be made by Virginia's elected representatives.

Likewise, the constitutionality of Virginia's statutory scheme regulating hostile takeovers does not depend upon its economic wisdom.

> [A] constitution is not intended to embody a particular economic theory, whether of paternalism and the organic relation of the citizen to the State or of laissez faire. It is made for people of fundamentally differing views, and the accident of our finding certain opinions natural and familiar or novel or even shocking ought not to conclude our judgment upon the question whether statutes embodying them conflict with the Constitution of the United States.

Lochner v. New York, 198 U.S. 45, 75-76, 49 L. Ed. 937, 25 S. Ct. 539 (1905) (Holmes, J., dissenting). These statutes may make it more difficult and expensive for Tyson to acquire a Virginia corporation. The statutes may diminish the value of shares in Virginia corporations. Conversely, they may not. The particular effect that enacting these statutes has upon the value of Virginia corporations is unimportant; the importance lies in recognizing that the legislature is empowered to make that determination without interference from this court.

> There is not under our Constitution a judicial remedy for every . . . exercise of legislative power. The Framers carefully and with deliberate forethought refused so to enthrone the judiciary. In this situation, as in others of like nature, appeal for relief does not belong here. Appeal must be to an informed . . . electorate."

Baker v. Carr, 369 U.S. 186, 270, 7 L. Ed. 2d 663, 82 S. Ct. 691 (1962) (Frankfurter, J., dissenting).

IV.

The factual findings and legal conclusions contained in this court's three previous rulings are hereby adopted, as supplemented herein. Tyson's breach of fiduciary duty counterclaims fail because, based upon the record in this case, WLR's directors discharged their duties in accordance with their good faith business judgment of the best interests of the corporation.

An appropriate Order shall this day issue.

ENTERED: James H. Michael, Jr., Judge

Date December 6, 1994

ORDER

JUDGE JAMES H. MICHAEL, JR.

For the reasons stated in the accompanying Memorandum Opinion, it is this day

ADJUDGED AND ORDERED

as follows:

1. WLR's request, contained in paragraph 21(a) of the Amended Complaint for Declaratory and Injunctive Relief, for a declaratory judgment that Articles 14 and 14.1 of the Virginia Stock Corporation Act are valid, lawful, and binding pursuant to both the Virginia and the United States Constitutions shall be, and it hereby is, granted.

2. WLR's request, contained in paragraph 21(b) of the Amended Complaint for Declaratory and Injunctive Relief, for a declaratory judgment that the Rights Plan is valid, lawful and binding, and that it was adopted in full compliance with the laws of the Commonwealth of Virginia and any other applicable law shall be, and it hereby is, granted. The court cannot determine whether any Rights distributed pursuant to the Rights Plan will be valid and enforceable until such Rights are distributed.

3. WLR's request, contained in paragraph 21(c) of the Amended Complaint for Declaratory and Injunctive Relief, for a permanent injunction preventing Tyson, its affiliates, subsidiaries, officers, directors, and all others acting in concert with them or on their behalf, from bringing any action in any other court (a) challenging the constitutionality and validity of Articles 14 and 14.1 of the Virginia Stock Corporation Act; (b) attacking any aspect of the Rights Plan; or (c) otherwise relating to or involving Tyson's proposal to acquire WLR and the response to that proposal by WLR and its directors, officers, or agents, under state law or federal law shall be, and it hereby is, denied, except to the extent that ordi-

nary principles of res judicata and collateral estoppel apply.

4. WLR's request, contained in paragraph 21(d) of the Amended Complaint for Declaratory and Injunctive Relief, for costs and disbursements, including reasonable attorneys' fes shall be, and it hereby is, denied.

5. Tyson's request, contained in paragraph 94(a) of the Amended and Supplemental Counterclaims, for a declaratory judgment that the shares owned by counterclaim defendants William Wampler, Charles Wampler, George Bryan and Herman Mason are "interested shares" under the Control Share Act shall be, and it hereby is, denied.

6. Tyson's request, contained in paragraph 94(b) of the Amended and Supplemental Counterclaims, for a declaratory judgment that the Directors have breached and continue to breach their fiduciary duties and duty of loyalty shall be, and it hereby is, denied.

7. Tyson's request, contained in paragraph 94(c) of the Amended and Supplemental Counterclaims, for a declaratory judgment that the Control Share Act is unconstitutional shall be, and it hereby is, denied.

8. Tyson's request, contained in paragraph 94(d) of the Amended and Supplemental Counterclaims, for a declaratory judgment that the Virginia Affiliated Transactions Statute is unconstitutional shall be, and it hereby is, denied.

9. Tyson's request, contained in paragraph 94(e) of the Amended and Supplemental Counterclaims, for a declaratory judgment that the Disenfranchisement Amendment, Anti-Referendum Changes and Poison Pill are invalid shall be, and it hereby is, denied.

10. Tyson's request, contained in paragraph 94(f) of the Amended and Supplemental Counterclaims, for a declaratory judgment that the Virginia statutory scheme

regulating mergers and acquisitions is unconstitutional shall be, and it hereby is, denied.

11. Tyson's request, contained in paragraph 95(a) of the Amended and Supplemental Counterclaims, for a permanent injunction directing WLR to rescind the Disenfranchisement Amendment, or in the alternative to enjoin the operation of such Bylaw shall be, and it hereby is, denied.

12. Tyson's request, contained in paragraph 95(b) of the Amended and Supplemental Counterclaims, for a permanent injunction directing WLR to rescind the Anti-Referendum Changes, or in the alternative to enjoin the voting of any shares owned, directly or indirectly, by George Bryan, Herman Mason, Charles Wampler and William Wampler shall be, and it hereby is, denied.

13. Tyson's request, contained in paragraph 95(c) of the Amended and Supplemental Counterclaims, for a permanent injunction enjoining WLR from interfering in any way with the conduct of a prompt, fair, and impartial referendum under the Control Share Act shall be, and it hereby is, granted. None of the actions undertaken by WLR and challenged by Tyson in this lawsuit, however, interfere in any way with the conduct of a prompt, fair, and impartial referendum under the Control Share Act.

14. Tyson's request, contained in paragraph 95(d) of the Amended and Supplemental Counterclaims, for a permanent injunction directing WLR to rescind, or in the alternative to redeem, the Poison Pill shall be, and it hereby is, denied.

15. Tyson's request, contained in paragraph 95(e) of the Amended and Supplemental Counterclaims, for a permanent injunction enjoining WLR from taking any action in furtherance of the Poison Pill, Golden Parachutes, or Other Parachutes shall be, and it hereby is, denied.

16. Tyson's request, contained in paragraph 95(f) of the Amended and Supplemental Counterclaims, for a permanent injunction enjoining WLR from engaging in any transactions involving the issuance of WLR's voting securities shall be, and it hereby is, denied.

17. Tyson's request, contained in paragraph 95(g) of the Amended and Supplemental Counterclaims, for a permanent injunction directing WLR to rescind the Golden Parachutes and Other Parachutes shall be, and it hereby is, denied.

18. Tyson's request, contained in paragraph 96 of the Amended and Supplemental Counterclaims, for an Order directing WLR to make available for inspection and copying to Tyson or its representatives the corporate records to which Tyson states that it is entitled under Virginia Code §§ 13.1-770 to 13.1-771 shall be, and it hereby is, denied because Virginia law states that such an Order should be entered by the circuit court in the city or county where the corporation's principle office is located. See Va. Code Ann. § 13.1-773 (Michie 1993).

19. Tyson's request, contained in paragraph 112 of the Amended and Supplemental Counterclaims, for a declaratory judgment that the shares owned or controlled by the Directors and their Associates, as defined by Va. Code Ann. § 13.1-728.1 (Michie 1993), are Interested Shares under the Control Share Act shall be, and it hereby is, denied except to the extent that any such Director is also an employee of WLR. Tyson's request for a declaratory judgment that the shares owned or controlled by WLR's Officers and their Associates, as defined by Va. Code Ann. § 13.1-728.1 (Michie 1993), are Interested Shares under the Control Share Act shall be, and it hereby is, granted.

20. Tyson's request, contained in paragraph 113 of the Amended and Supplemental Counterclaims, for a permanent injunction enjoining WLR from voting or permit-

ting the voting on the Tyson Proposal of any WLR shares owned or controlled by the Directors, WLR's Officers, or their Associates shall be, and it hereby is, denied except to the extent that any such shares are interested shares, as defined by Va. Code Ann. § 13.1-728.1 (Michie 1993).

21. Tyson's request, contained in paragraph 114 of the Amended and Supplemental Counterclaims, for costs and attorneys' fees shall be, and it hereby is, denied.

22. This action shall be, and it hereby is, dismissed and stricken from the docket of the court.

The clerk is hereby directed to send a certified copy of this Order, and the accompanying Memorandum Opinion, to all counsel of record.

ENTERED: James H. Michael, Jr.

Date December 6, 1994

APPENDIX C

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF VIRGINIA
HARRISONBURG DIVISION

Civil Action No. 94-012-H

WLR FOODS, INC.,
Plaintiff,

v.

TYSON FOODS, INC.,
Defendant,

and

TYSON FOODS, INC. and WLR ACQUISITION CORP.,
Counterclaimants,

v.

WLR FOODS, INC., *et als.*,
Counterclaim-defendants.

August 9, 1994, Decided
August 9, 1994, Filed, Entered

MEMORANDUM OPINION

JUDGE JAMES H. MICHAEL, JR.

Tyson Foods, Inc. (Tyson) has commenced a hostile attempt to take over WLR Foods, Inc. (WLR). In doing

so, it has made a tender offer to WLR shareholders of $30 per share. WLR has filed suit seeking a declaratory judgment affirming various measures undertaken by WLR to defend against Tyson's takeover attempt. Tyson has counterclaimed, asserting that such measures are illegal, that WLR's Board of Directors has breached its fiduciary duty, and that Virginia's statutory scheme affecting hostile takeover attempts is unconstitutional.

Presently before the court is Tyson's motion for a preliminary injunction challenging the constitutionality of four Virginia statutes that affect its attempt to take over WLR. The issues before the court are (1) whether the Virginia statutes are preempted by the Williams Act, 15 U.S.C. §§ 78m(d)-(e), 78n(d)-(f); and (2) whether the Virginia statutes violate the Commerce Clause, U.S. Const. art. I, § 8, cl. 3. Tyson's motion for a preliminary injunction is denied.

I.

Tyson's constitutional challenge implicates four separate Virginia statutes ("the Virginia statutes"). The first is the Control Share Acquisitions Act ("Control Share Act"), Va. Code Ann. §§ 13.1-728.1 to -728.9 (Michie 1993). Generally, the Control Share Act denies voting rights to any shares held by an acquiror not approved by a Virginia corporation's Board of Directors, unless a majority of disinterested shares votes to grant such rights in a shareholder referendum. Id. § 13.1-728.3. "Interested" shares may not vote, and they are defined to include shares held by (1) the acquiror; (2) any officer of the target corporation; and (3) any employee of the target corporation who is also a director. Id. § 13.1-728.1. The Control Share Act's provisions apply upon a person's acquisition of at least one-fifth of the total votes entitled to be cast in an election of directors. Id. This court previously has refused to preliminarily enjoin from voting in the control share referen-

dum four WLR director/employees who continued as directors but resigned as employees for the purpose of voting their shares in the control share referendum. See *WLR Foods, Inc. v. Tyson Foods, Inc.*, 857 F. Supp. 496, 1994 WL 283306 (W.D. Va. 1994).

The second statute at issue is the Affiliated Transactions Act, Va. Code Ann. §§ 13.1-725 to -727.1 (Michie 1993). As applied to this case, this statute makes it very difficult to merge with or otherwise absorb a Virginia corporation acquired in a tender offer for three years after the acquisition. Pursuant to this statute, Tyson would not be permitted to engage in an "affiliated transaction" [1] with WLR for three years unless the transaction was approved by (1) a majority, but not less than two, of WLR's "disinterested directors"; [2] and (2) two-thirds of voting shares in WLR, other than shares beneficially held by Tyson. Id. § 13.1-725.1. After three years, WLR may engage in an affiliated transaction with Tyson if (1) approved by two-thirds of voting shares in WLR, other than shares beneficially held by Tyson; or (2) approved by a majority of disinterested directors; or (3) Tyson pays a statutorily defined value to each class of WLR's voting securities. Id. §§ 13.1-726, -727.

The third statute affecting Tyson's tender takeover attempt is Va. Code Ann. § 13.1-646 (Michie 1993) ("Poi-

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[1] An affiliated transaction includes (1) a merger involving WLR and Tyson; (2) a share exchange in which Tyson acquires a class or series of voting shares of WLR; (3) disposition to Tyson of WLR's assets in excess of five percent of WLR's net worth, or any guaranty by WLR of Tyson's indebtedness in excess of five percent of WLR's net worth; (4) disposition to Tyson of more than five percent of the fair market value of voting shares in WLR; (5) dissolution of WLR if proposed by Tyson; and (6) any transaction which has the effect of increasing by more than five percent the percentage of voting shares in WLR owned by Tyson. Va. Code Ann. § 13.1-725 (Michie 1993).

[2] "Disinterested directors" essentially is defined to consist of WLR directors who were directors before Tyson acquired WLR. Id.

son Pill Statute"). This statute authorizes a corporation's directors to issue discriminatory rights in favor of specific persons or classes, limited only by Va. Code § 13.1-690, governing directors' business judgment. Id. § 13.1-646 (B). WLR has used this statute to enact a "flip-in" poison pill, which triggers upon the accumulation of fifteen percent or more of WLR stock by any shareholder. When triggered, WLR's poison pill allows all shareholders, except the shareholder who has accumulated at least fifteen percent of the shares, to purchase $136 worth of WLR stock for only $68. When exercised, this will substantially reduce the percentage of total shares held by Tyson, while simultaneously diminishing the value of each share. As an example, if Tyson accumulated sixty percent of 10,000,000 WLR shares outstanding through its $30 per share tender offer, the poison pill would trigger and could reduce Tyson's stake to only 21.3 percent, and the value of each share could drop from $30 to $20.33.

The final statute at issue is Va. Code Ann. § 13.1-690 (Michie 1993) ("Business Judgment Statute"). This court previously has ruled that § 690 focuses on the procedural indicia of good faith business judgment as measured by resort to an informed decisionmaking process, thus making irrelevant the substantive advice received by directors. *WLR Foods, Inc. v. Tyson Foods, Inc.*, 857 F. Supp. 492, 1994 WL 377257 (W.D. Va. 1994). In short, the statute focuses on whether directors relied upon information and advice which they believed in good faith to be competent and reliable. See id. at *1. Tyson alleges that this prevents it from discovering whether WLR's directors acted in the best interests of the corporation in utilizing the other three statutes to defend against Tyson's takeover attempt.

II.

In deciding whether to issue a preliminary injunction, the court must consider four factors: (1) the likelihood of irreparable harm to Tyson without the injunction; (2)

the likelihood of harm to WLR with the injunction; (3) Tyson's likelihood of success on the merits; and (4) the public interest. *Blackwelder Furniture Co. v. Selig Mfg. Co.*, 550 F.2d 189, 193-96 (4th Cir. 1977). These four factors are to be weighed flexibly based on a sliding-scale approach; a strong showing by a party with regard to one factor reduces the need for that party to make a strong showing concerning other factors. *Dan River, Inc. v. Icahn*, 701 F.2d 278, 283 (4th Cir. 1983) (citing *North Carolina State Ports v. Dart Containerline Co.*, 592 F.2d 749, 750 (4th Cir. 1979)). The balance of hardships created by the likelihood of irreparable harm to each side is the most important consideration, and because of the extraordinary nature of a preliminary injunction the harm to the movant truly must be irreparable, rather than merely substantial, for a preliminary injunction to be granted. See *Hughes Network Sys., Inc. v. Interdigital Communications Corp.*, 17 F.3d 691, 693-94 (4th Cir. 1994).

In this case, the balance of hardships and the public interest are tied to the likelihood of success on the merits. Several cases recognize the harm caused to tender offerors by delay or defeat of its offer caused by improper or illegal tactics undertaken by management. See, e.g., *Dan River*, 701 F.2d at 283-84; *Kennecott Corp. v. Smith*, 637 F.2d 181, 190 (3d Cir. 1980); *Bendix Corp. v. Martin Marietta Corp.*, 547 F. Supp. 522, 532 (D. Md. 1982). In this case, Tyson alleges that the acquisition of WLR presents a unique business opportunity and that allowing WLR's management to improperly block the takeover would cause irreparable harm. Any potential harm to Tyson, however, is predicated on the invalidity of the statutes. If the statutes are constitutional, then WLR's use of them is not improper. Likewise, if the statutes are unconstitutional, then the delay in Tyson's takeover caused by WLR's use of the statutes potentially could cause great harm to Tyson. The court notes, however, that Tyson

has presented no evidence that WLR's directors are preventing dissemination of information to shareholders or that they have taken any actions to entrench themselves further subsequent to Tyson's filing of the preliminary injunction motion. The possibility exists, of course, that before final judgment is entered in this matter WLR's directors could take such action or that the poison pill could trigger, but the extent of harm caused to Tyson would depend upon the constitutionality of the statutes pursuant to which the directors acted.

Similarly, the extent of harm caused to WLR by a preliminary injunction would depend upon the likelihood of success on the merits. If the court eventually declares the Virginia statutes constitutional but grants the preliminary injunction, WLR is robbed of its opportunity to take legitimate defensive measures presumably designed to ensure the adequacy of Tyson's tender offer. Conversely, if the statutes are unconstitutional WLR would suffer no harm because its actions pursuant to the statutes would have been invalid.

Furthermore, the public interest is directly tied to the likelihood of success on the merits when the issue is the validity of statutes. If the statutes are valid, then the public interest is served by their enforcement,. If they are unconstitutional, then the public interest is served by their invalidation. Because in this case the other three Blackwelder factors flow from it, the likelihood of success on the merits will determine whether the court will grant a preliminary injunction.

III.

A preliminary matter will affect the merits of Tyson's constitutional challenges. Tyson asserts that the four Virginia statutes operate as a scheme in the area of hostile takeovers and tender offers. As a result, Tyson contends that even if each statute individually is constitutional, the scheme as a whole can be unconstitutional.

The Supreme Court recently addressed this issue in its June 17, 1994 decision in *West Lynn Creamery, Inc. v. Healy*, 129 L. Ed. 2d 157, 62 U.S.L.W. 4518, 114 S. Ct. 2205 (1994). In that case, the Court invalidated on Commerce Clause grounds a Massachusetts pricing order containing two components: (1) an assessment on all milk, whether produced in-state or out of state, sold to in-state retailers; and (2) a subsidy provided to in-state dairy farmers using the funds received from the assessment. Id. at 4520. The Court rejected the proposition that the pricing order was valid merely because it was the combination of two independently lawful regulations. Id. at 4522-23. Tyson asserts that this case conclusively shows that statutes may be unconstitutional as a scheme, even if the scheme's components are all separately constitutional.

West Lynn Creamery is not directly on point, however. Unlike this case, it involved two statutes that the legislature intentionally joined together to create an integrated program—the subsidy flowed directly from the funds received from the assessment. The Court noted that "by conjoining a tax and a subsidy, Massachusetts has created a program more dangerous to interstate commerce than either part alone." Id. at 4522. The Court refused to "analyze separately two parts of an integrated regulation, [because] we cannot divorce the premium payments from the use to which they are put." Id. at 4523. In contrast, the statutes that Tyson challenges here are not parts of an integrated program. They were enacted separately at separate times for separate purposes and with separate applications. Their only apparent link is that they all affect Tyson's bid to take over WLR.

Notwithstanding this distinction, dicta in West Lynn Creamery could be read to support Tyson's assertion that a statutory scheme can be invalid even if all of its parts are constitutional. The Court later stated in West Lynn Creamery, "our Commerce Clause jurisprudence is not so rigid as to be controlled by the form by which a State

erects barriers to commerce. Rather our cases have eschewed formalism for a sensitive, case-by-case analysis of purposes and effects." Id. Based on this statement, it could be argued that if several statutes actually affect an area of interstate commerce or actually stand as an obstacle to the purposes and objectives of federal law, then they should not be used together in a manner detrimental to interstate commerce or in contravention of federal law. The effect of the statutes, if burdensome enough, should be sufficient to preclude a particular unconstitutional application of the statutes used together. "The critical consideration is the overall effect of the statute[s] on both local and interstate activity." *Brown-Forman Distillers Corp. v. New York State Liquor Auth.*, 476 U.S. 573, 579, 90 L. Ed. 2d 552, 106 S. Ct. 2080 (1986). Courts must "determine whether the statute[s] under attack, whatever [their] name may be, will in [their] practical operation work discrimination against interstate commerce." *West Lynn Creamery*, 62 U.S.L.W. at 4523 (citations omitted). This dicta suggests, therefore, that the practical operation of statutes is more important than their form.

Extending West Lynn Creamery to non-integrated statutes not intentionally joined together, however, would create enormous difficulties for district courts. In West Lynn Creamery, the Court was able to invalidate the two components of the milk pricing order because the legislature purposefully linked them together. Id. at 4522. The Court was able to do so because the Massachusetts legislature never intended either statute to stand separately. With non-integrated statutes that are separately consitutional, however, what is a court to do if it determines that the overall "scheme" is unconstitutional? The statutes have separate applications that are constitutional, so none can be struck down as unconstitutional. Only when used together in a particular way would they be unconstitutional. Thus, a court only could enjoin that particular unconstitutional use.

But what is the particular unconstitutional way in which the Virginia statutes were used? At what point did WLR enter the realm of unconstitutionality? Was it when they approved the poison pill? Was it when they called for a control share referendum? Does it matter whether they understood the implications of the Affiliated Transactions Act when they took action? Could they approve a poison pill if they opt out of the Control Share Act? Could they utilize the Control Share Act if they do not adopt a poison pill? From these and many more questions that have no clear answers, it is apparent that a court would be faced with a dilemma when evaluating a non-integrated statutory "scheme". If the collective statutes were used unconstitutionally, what part should be enjoined? Perhaps the management could be given a choice—either redeem the poison pill or opt out of the Control Share Act. Would that be sufficient to overcome the unconstitutional application of the statutes? Perhaps management could be precluded from utilizing the Control Share Act or adopting a poison pill anytime the Affiliated Transactions Act applies. The Affiliated Transactions Act applies, however, every time that the Control Share Act applies because of the ownership percentage requirements that trigger each statute. This would mean that management would always be precluded from using the Control Share Act, which as a practical matter is the same as declaring the Control Share Act unconstitutional.

The convoluted nature of the matter demonstrates the problems of extending West Lynn Creamery beyond an integrated statutory program. Despite such problems, however, the court will assume without deciding that non-integrated statutes can be unconstitutional as a scheme even if they are separately constitutional.

IV.

The first question in this case is whether the Williams Act, 15 U.S.C. §§ 78m(d)-(e), 78n(d)-(f), preempts

the Virginia statutes. Pursuant to the Supremacy Clause of the United States Constitution, federal law is the "supreme law of the Land . . . , any Thing in the Constitution or Laws of a State to the Contrary notwithstanding." U.S. Const. art. VI, cl. 2. In addition to an explicit indication by Congress of its intent to preempt state law, state statutes are preempted when it is physically impossible to comply with both federal and state laws or when "the state 'law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.'" *CTS Corp. v. Dynamics Corp. of America*, 481 U.S. 69, 78-79, 95 L. Ed. 2d 67, 107 S. Ct. 1637 (1987) (quoting *Hines v. Davidowitz*, 312 U.S. 52, 67, 85 L. Ed. 581, 61 S. Ct. 399 (1941)). Tyson contends that federal law preempts the Virginia statutes because they stand as an obstacle to the purposes and objectives of the Williams Act.

The Williams Act regulates disclosure to shareholders and procedures required in tender offers. First, it requires a tender offeror to file a statement disclosing, inter alia, the offeror's identity and background, the funding source to be used, any anticipated changes in corporate structure, and the extent of the offeror's holdings in the target corporation. See 15 U.S.C. § 78n(d)(1) (incorporating § 78m(d)(1) by reference); 17 C.F.R. §§ 240.13d-1, 240.14d-3 (1986). Secondly, it establishes certain procedures that tender offerors must follow. Shareholders who have tendered their shares may withdraw them while the offer remains open if the shares have not been purchased within sixty days of the commencement of the offer. 15 U.S.C. § 78n(d)(5); 17 C.F.R. § 240.14d-7(a)(1), as amended by 51 Fed. Reg. 25873 (1986). Also, any offer must remain open for at least twenty business days. Id. § 240.14e-1(a). If the offeror receives more shares than it seeks to purchase, then it must purchase on a pro rata basis from all tendering shareholders. 15 U.S.C. § 78n(d)(6); 17 C.F.R. § 240.14(8). Lastly, the offeror must pay the same price for all shares

purchased during the offer, including paying any increase to shareholders that already had tendered their shares before the increase. 15 U.S.C. § 78n(d)(7).

The primary purpose of the Williams Act is to protect shareholders from the coercive aspects of tender offers by "placing investors on an equal footing with the takeover bidder." *CTS*, 481 U.S. at 82 (quoting *Piper v. Chris-Craft Indus., Inc.*, 430 U.S. 1, 30, 51 L. Ed. 2d 124, 97 S. Ct. 926 (1977)). The Williams Act protects investors in part by attempting to maintain a balance between management and the offeror to create a fairly level playing field in the contest for shares. See *Edgar v. MITE Corp.*, 457 U.S. 624, 633, 73 L. Ed. 2d 269, 102 S. Ct. 2629 (1982) (plurality opinion) ("It is also crystal clear that a major aspect of the effort to protect the investor was to avoid favoring either management or the takeover bidder."). This has led to the view endorsed by Tyson that balance between management and the offeror is an independent purpose of the Williams Act. As a result, Tyson asserts that the Williams Act preempts the Virginia statutes if they deprive a tender offer of a "meaningful opportunity for success." [3]

This court rejects the meaningful opportunity for success test for determining whether the Williams Act preempts the Virginia statutes. Creating neutrality between

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[3] The "meaningful opportunity for success" test also has been used by a few district courts in deciding whether the Williams Act preempts state statutes. See, e.g., Topper Acquisition Corp. v. Emhart Corp., No. 89-00110-R, 1989 U.S. Dist. LEXIS 9910, at *12 (E.D. Va. Mar. 23, 1989) ("The Williams Act preempts state anti-takeover statutes which deprive a hostile bidder of a 'meaningful opportunity for success.'"); *West Point-Pepperell, Inc. v. Farley, Inc.*, 711 F. Supp. 1096, 1103 (N.D. Ga. 1989) (finding preemption if a statute leaves a hostile offeror with no meaningful opportunity for success absent approval from the board that it seeks to replace); *BNS, Inc. v. Koppers Co., Inc.*, 683 F. Supp. 458, 469 (D. Del. 1988) (creating the meaningful opportunity for success test).

management and the offeror simply is not an independent purpose of the Williams Act. "Neutrality is, rather, but one characteristic of legislation directed toward a different purpose—the protection of investors." *Piper*, 430 U.S. at 29.[4] Even the three justice plurality in MITE, which Tyson reads as supporting its view, makes that distinction. "Congress sought to protect the investor not only by furnishing him with the necessary information but also by withholding from management or the bidder any undue advantage that could frustrate the exercise of an informed choice." *MITE*, 457 U.S. 624, 634, 73 L. Ed. 2d 269, 102 S. Ct. 2629 (emphasis added). In CTS,[5] the Court clarified that "the overriding concern of the MITE plurality was that the . . . statute considered in that case operated to favor management against offerors, to the detriment of shareholders." *CTS*, 481 U.S. at 81-82 (emphasis added). Management must not be permitted to gain an undue advantage over the investors, but the Williams Act simply does not mandate that management have no advantage over the offeror, as long as such advantage does not harm the investors. The crucial relationships are those between the investors and management and between the investors and the offeror, not the relationship between management and the offeror. The purpose of the Williams Act is to protect investors by ensuring an informed choice; therefore, the Virginia statutes are preempted if they favor either management or the tender offeror over the investors.

The Virginia statutes clearly give power to management and remove it from tender offerors, but they are preempted

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[4] Neither the plurality in MITE nor the Court in CTS questioned any part of Piper.

[5] The Court in CTS noted that it was not bound by the reasoning in MITE because it was not a majority opinion. It stated that "we need not question that reasoning, however, because we believe the [statute] passes muster even under the broad interpretation of the Williams Act articulated by Justice White in MITE." *CTS*, 481 U.S. at 81.

only if they do so to the detriment of shareholders. Viewing all of the statutes collectively, the statutory "scheme" puts several obstacles in the way of Tyson's tender offer. First, if Tyson acquires more than fifteen percent of WLR's shares a poison pill will trigger, substantially reducing Tyson's percentage of ownership and the value of each share.[6] Then, pursuant to the Control Share Act, unless the directors opt out of its provisions, disinterested shareholders could vote to take away voting rights from any shares that Tyson owns. If Tyson nonetheless managed to take over WLR, it effectively would be precluded from merging it into Tyson for at least three years pursuant to the Affiliated Transactions Act. Furthermore, pursuant to the Business Judgment Statute the decisions of WLR's directors in enacting defensive measures could be reviewed only for good faith business judgment, with no discovery of the substantive advice that the directors received in reaching their decisions.

The Virginia statutes do not stand as an obstacle to the purposes and objectives of the Williams Act. In CTS, the Supreme Court reviewed an Indiana statute virtually identical to the Control Share Act and held that it was not preempted by the Williams Act. *CTS*, 481 U.S. at 81-84. The Control Share Act furthers the policy of investor protection by allowing disinterested shareholders to vote as a group and avoid the coercive nature of two-tiered tender offers, in which shareholders are virtually forced to tender out of fear that a successful offeror will seize control and buy non-tendered shares at a depressed price. *Id.* at 83. The Control Share Act excludes management and the tender offeror and allows disinterested shareholders collectively to evaluate the fairness of the offer. *Id.* at 83-84. Furthermore, by requiring offerors to furnish target corporations with a control share acquisition

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[6] Assuming 10,000,000 shares in WLR outstanding with a value of $30 per share, Tyson would need to hold approximately eighty-five percent of WLR shares after the tender offer in order to retain a majority after the poison pill triggered.

statement,[7] which then must be mailed by the target corporation to shareholders, see Va. Code Ann. § 13.1-728.6(B)(1) (Michie 1993), the Control Share Act facilitates the free exercise of informed choices by independent investors.[8]

Likewise, the Affiliated Transactions Act does not stand as an obstacle to the purposes and objectives of the Williams Act. Although it makes tender offers less attractive by effectively delaying a merger for at least three years, it does not regulate the procedures or disclosures required in a tender offer. It applies whether an acquisition was made by tender offer or any other means of gaining control. As the Seventh Circuit recognized in *Amanda Acquisition Corp. v. Universal Foods Corp.*, 877 F.2d 496 (7th Cir. 1989) where it held that the Williams Act does not preempt a statute very similar to the Affiliated Transactions Act, "delay in completing a second-stage merger may make the target less attractive, and thus depress the price offered or even lead to an absence of bids; it does not, however, alter any of the procedures governed by federal regulation." *Id.* at 504.

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[7] The control share acquisition statement provides shareholders with even more information than is required by the Williams Act. Compare Va. Code § 13.1-728.4 with 15 U.S.C. § 78n(d)(1) and 17 C.F.R. §§ 240.13d-1, 240.14d-3.

[8] Tyson also asserts that the Control Share Act is preempted by Section 14(a) of the Securities Exchange Act of 1934, 15 U.S.C. 78n, because § 14(a) occupies the field of the regulation of proxy solicitation. The court finds no evidence in § 14(a) that Congress intended to do so. Moreover, the Control Share Act does not seek to regulate the process of proxy solicitation, which is the focus of § 14(a); rather, it merely affects the timing of when solicitation may begin. See Va. Code Ann. § 13.1-728.5(E) (Michie 1993). Tyson further contends that the Control Share Act is preempted because § 13.1-728.4(6) requires more information to be sent to shareholders than the SEC mandates. In light of the above discussion concerning the fundamental purpose of the Williams Act, such a contention is without support.

To the extent that it does affect Tyson's tender offer, however, the Virginia legislature apparently intended the Affiliated Transactions Act to protect minority shareholders from self-dealing by the majority and to discourage corporate raiders from using a target corporation's assets for the raider's own devices or from extracting greenmail from the target. Revised Joint Bar Comm. Commentary to Section 13.1-725 of the Virginia Corporation Law 239 (Michie 1992). Like the Control Share Act, the Affiliated Transactions Act gives independent shareholders a tool to prevent abuses by an acquiror. It interferes neither with the procedures set by the Williams Act nor with the ability of shareholders to make an informed choice about a tender offer.

The Poison Pill Statute also does not stand as an obstacle to the purposes and objectives of the Williams Act. It gives management a very strong tool to use to block a tender offer, but directors may not do so to the detriment of the shareholders. Any action by directors regarding poison pills is explicitly subject to the provisions of the Business Judgment Statute. See Va. Code Ann. § 13.1-646(B) (Michie 1993). Directors are precluded from adopting or refusing to redeem a poison pill if to do so does not comport with the directors' "good faith business judgment of the best interests of the corporation." Id. § 13.1-690. The Poison Pill Statute creates the potential for management to entrench itself at the expense of the shareholders, but the possibility of incurring personal liability for breach of fiduciary duty provides a strong incentive for directors to use poison pills only to defeat inadequate offers. In fact, a 1988 study conducted by Georgeson & Company, Inc., a leading proxy solicitation firm, found that target corporations with poison pills received an average final offer 78.5% greater than the price of its stock six months before the commencement of the tender offer, while corporations without poison pills gained only 57%. See Fogg & Sterling, Poison Pill Update, in M. Katz & R. Loeb, Acquisitions and Mergers

1988 817, 844 (1988). Furthermore, the study revealed that target corporations with poison pills outperformed the S & P 500 Index by 53%, while corporations with no poison pills performed only 31% better than the Index. Id. at 845. Provided that directors utilize poison pills in the best interests of the corporation, as Virginia's Poison Pill Statute requires, poison pills may be an effective method for increasing the bid in tender offers.

Reviewing director conduct pursuant to the above three statutes, using the Business Judgment Statute, also does not cause the Virginia statutory "scheme" to be pre-empted. Directors must act based on their good faith business judgment of the best interests of the corporation. See Va. Code § 13.1-690. Tyson asserts that directors wishing to defeat a hostile tender offer need only hear advice from competent sources and their decisions become insulated from judicial scrutiny. The court disagrees. Courts must look to procedural indicia of good faith business judgment; resort to an informed decision-making process must be undertaken in good faith. *WLR Goods, Inc. v. Tyson Foods, Inc.*, 857 F. Supp. 492, 1994 WL 377257 at *2 (W.D. Va. 1994). Directors are entitled to rely on competent advice, not to hear and disregard it just to go through the motions of satisfying § 690. This prevents directors from attempting to defeat a tender offer unless they rely in good faith on competent advice and information stating that the offer is not in the best interests of the corporation. Although the court expresses no opinion concerning whether WLR's directors complied with § 690 in attempting to defeat Tyson's tender offer, the statute itself does not stand as an obstacle to the purposes and objectives of the Williams Act, even when used in conjunction with the other three statutes at issue.[9] Management still is unable to interfere with

[9] Management's compliance with its fiduciary duties does not affect the constitutional issues presented.

In the unlikely event that management were to take actions designed to diminish the value of the corporation's shares, it

investors' free exercise of an informed choice in responding to a tender offer.[10]

The Virginia statutory "scheme" makes tender offers for Virginia corporations more difficult than they would be absent the statutes. Although the statutes seem to give power to management with the same hand that takes it away from offerors, they do not do so to the detriment of investors. The Williams Act does not grant investors a right to tender their shares at a premium; it merely provides that certain information must be provided and certain procedures must be followed to ensure that investors are permitted to make an informed choice. The cumulative effect of the Virginia statutes does not interfere with those objectives in any way. As a result, the Williams Act does not preempt the Virginia statutes, either separately or together.

V.

The court next must decide whether the Virginia statutes violate the Commerce Clause of the United States

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> may incur liability under state law. But this problem does not control our pre-emption analysis. Neither the [Williams] Act nor any other federal statute can assure that shareholders do not suffer from the mismanagement of corporate officers and directors.

CTS, 481 U.S. at 85 n.9.

[10] Because the Business Judgment Statute requires directors to act in the best interests of the corporation, it also ensures that Virginia's statutory "scheme" passes Tyson's broad "meaningful opportunity for success" test. All that an offeror must do in order to have a meaningful opportunity for success is present a high enough offer, acceptance of which is in the best interests of the corporation. Directors then could opt out of the Control Share Act and redeem the poison pill. Furthermore, if they believed that an immediate merger was in the best interests of the corporation, they could vote to override the restrictions of the Affiliated Transactions Act and encourage shareholders to do the same.

Constitution, U.S. Const. art. 1, § 8, cl. 3. Although on its face the Commerce Clause merely gives Congress the power to regulate commerce among the states, "it has been settled for more than a century that the Clause prohibits States from taking certain actions respecting interstate commerce even absent congressional action." *CTS Corp. v. Dynamics Corp. of America,* 481 U.S. 69, 87, 95 L. Ed. 2d 67, 107 S. Ct. 1637 (1987). Tyson asserts that the Virginia statutes violate the dormant Commerce Clause in two ways. First, Tyson argues that the statutes clearly discriminate against interstate commerce and are not justified by a valid purpose unrelated to economic protectionism. See *C & A Carbone, Inc. v. Town of Clarkstown,* 128 L. Ed. 2d 399, 114 S. Ct. 1677, 1682 (1994). Secondly, Tyson contends that the statutes impose a burden on interstate commerce that exceeds the statutes' putative local benefits. See *Pike v. Bruce Church, Inc.,* 397 U.S. 137, 142, 25 L. Ed. 2d 174, 90 S. Ct. 844 (1970).

As an initial matter, there can be no doubt that the Virginia statutes affect interstate commerce. "It is well settled that actions are within the domain of the Commerce Clause if they burden interstate commerce or impede its free flow." *Carbone,* 114 S. Ct. at 1682 (citing *NLRB v. Jones & Laughlin Steel Corp.,* 301 U.S. 1, 31, 81 L. Ed. 893, 57 S. Ct. 615 (1937)). The Virginia statutes clearly do so by affecting the interstate market for corporate control. In fact, this principle was so obvious to the Supreme Court in CTS that it did not bother to say so; it simply considered whether the statute at issue violated the Commerce Clause. See *CTS,* 481 U.S. at 87.

A.

The first way in which Tyson contends that the Virginia statutes violate the Commerce Clause is by discriminating against interstate commerce. There is no dispute that the Virginia statutes treat in-state and out of state

tender offerors the same way; the statutes apply regardless of who tries to take over a Virginia corporation. Statutes may discriminate, however, even if they treat instate and out of state offerors equally. See *Carbone,* 114 S. Ct. at 1682. Tyson asserts that the statutes discriminate against interstate commerce because they impose an effective ban on interstate commerce in corporate control of Virginia corporations. To prevail on this issue, Tyson attempts to position this case within the line of cases culminating in Carbone.

In Carbone, the Supreme Court analyzed a local ordinance that required all nonhazardous solid waste in Clarkstown, New York to be taken to a transfer station for separation of recyclable from nonrecyclable items. Id. at 1680. All waste processors, whether instate or out of state, were prohibited from processing solid waste anywhere other than at the designated transfer station, where they were required to pay a tipping fee even if the waste had already been sorted before arriving at the station. Id. at 1681. The Court held that the ordinance violated the Commerce Clause because it hoarded a local resource and squelched all competition for separating recyclable from non-recyclable waste. Id. at 1683. See also *Fort Gratiot Sanitary Landfill, Inc. v. Michigan Dept. of Natural Resources,* 119 L. Ed. 2d 139, 112 S. Ct. 2019 (1992) (invalidating a statute prohibiting landfill operators from accepting solid waste generated outside of the county because of the statute's protectionist nature); *Dean Milk Co. v. Madison,* 340 U.S. 349, 354, 95 L. Ed. 329, 71 S. Ct. 295 (1951) (invalidating an ordinance that made it unlawful to sell milk as pasteurized unless it was processed within five miles of the city because the ordinance protected a local industry from any competition from out of state); *Brimmer v. Rebman,* 138 U.S. 78, 82-83, 34 L. Ed. 862, 11 S. Ct. 213 (1891) (invalidating a Virginia statute imposing special inspection fees

on meat from animals slaughtered more than 100 miles from the place of sale because the statute effectively prevented the sale of meat from animals slaughtered in distant states).

The Virginia statutes do not have the same effect as the statutes struck down in the Carbone line of cases. By Tyson's own admission, these cases stand for the proposition that a statute clearly discriminates against interstate commerce if it completely eliminates the flow of interstate commerce in an article of commerce. Tyson's Supp. Mem. on Constit. Issues at 30. The Virginia statutes do not completely eliminate the flow of interstate commerce in hostile takeover attempts of Virginia corporations. More to the point, they do not remove competition for corporate control or hoard a local resource. Any potential acquiror that makes an adequate offer may gain control of a Virginia corporation; the Virginia statutes make it more expensive to do so.

In the Carbone line of cases, similarly situated entities were treated differently. In *Carbone*, 128 L. Ed. 2d 399, 114 S. Ct. 1677, one transfer station could separate waste, but others could not do so. In *Fort Gratiot*, 119 L. Ed. 2d 139, 112 S. Ct. 2019, some solid waste producers could dump their waste, but others could not do so. In *Dean Milk*, 340 U.S. 349, 95 L. Ed. 329, 71 S. Ct. 295, some producers could sell their milk as pasteurized, but others could not do so. In *Brimmer*, 138 U.S. 78, 34 L. Ed. 862, 11 S. Ct. 213, some dealers could sell their meat without a special fee, but others could not do so. In this case, however, everyone stands on equal footing in making tender offers to shareholders of Virginia corporations. As the Supreme Court stated, "because nothing in the [statutes] imposes a greater burden on out-of-state offerors than it does on similarly situated [in-state] offerors, we reject the contention that the [stat-

utes] discriminate[] against interstate commerce." *CTS*, 481 U.S. at 88.[11]

B.

The second way in which Tyson contends that the Virginia statutes violate the Commerce Clause is pursuant to the balancing test enunciated in *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 25 L. Ed. 2d 174, 90 S. Ct. 844 (1970). Pursuant to the Pike test, the Virginia statutes violate the Commerce Clause if they impose a burden on interstate commerce that clearly exceeds their putative local benefits. See *id.* at 142. WLR asserts, however, that the Pike test no longer applies to Commerce Clause challenges to state laws regulating intrastate corporate governance, based on the Supreme Court's treatment of the issue in CTS. In that case, the Court rejected the argument that Indiana's Control Share Act violates the Commerce Clause because of its potential to hinder tender offers, but it did so without ever mentioning the Pike test. See *CTS*, 481 U.S. at 89-92. This has caused some courts to conclude that the Pike test no longer applies in this area. See, e.g., *Amanda Acquisition Corp. v. Universal Foods, Inc.*, 877 F.2d 496, 507 (7th Cir. 1989); *Hyde Park Partners, L.P. v. Connolly*, 839 F.2d 837, 844 (1st Cir. 1988). Although the Court did not mention Pike by name, it examined tender offers' effect on interstate commerce and the local interests that Indiana sought to advance through the Control Share Act. Id. Without explicitly referring to Pike, the Court implicitly found that a state's interests in defining the attributes of corporations organized pursuant to its laws were sufficient to justify any burdens on interstate commerce associated with the Control Share Act. Although the Pike test may not have been used in name, its logic was used in principle.

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[11] In CTS, the Court did not even address the Carbone line of cases, amplifying the distinction between the regulations struck down in those cases and statutes that evenhandedly regulate tender offers.

In examining the Virginia statutes' effect on interstate commerce, Tyson asserts that they violate the Commerce Clause by effectively foreclosing the opportunity to gain control of a Virginia corporation absent consent of the management. In this area, however, "state regulation of corporate governance is regulation of entities whose very existence and attributes are a product of state law." *CTS*, 481 U.S. at 89. By enacting these and other statutes, Virginia has defined the attributes of its corporations. Based upon the four Virginia statutes, a Virginia corporation is an entity (1) in which shareholders holding over one-fifth of the shares have no voting rights absent consent of the directors or the disinterested shareholders (Control Share Act); (2) that cannot be merged into another entity for three years without consent of its directors (Affiliated Transactions Act); (3) that can issue discriminatory rights to the detriment of some of its shareholders, provided that such discrimination is in the best interests of the corporation (Poison Pill Statute); and (4) whose directors must conduct themselves based upon their good faith business judgment of the best interests of the corporation, and who may satisfy this standard by relying in good faith on competent advice received pursuant to an informational process undertaken in good faith (Business Judgment Statute).

"By prohibiting certain transactions, and regulating others, such laws necessarily affect certain aspects of interstate commerce." *Id.* at 90. The Virginia statutes make it more difficult and more expensive to gain control of a Virginia corporation, but so do supermajority voting requirements, dissenters' rights, and staggered directors' terms. See *id.* at 90 & n.12. In fact, states could ban mergers completely without violating the Commerce Clause. *Louisville & Nashville R.R. v. Kentucky*, 161 U.S. 677, 701-04, 40 L. Ed. 849, 16 S. Ct. 714 (1896); *Amanda*, 877 F.2d at 506.

In defining the attributes of its corporations, Virginia "has an interest in promoting stable relationships among

parties involved in the corporations it charters, as well as in ensuring that investors in such corporations have an effective voice in corporate affairs." *CTS*, 481 U.S. at 91. Through the four statutes at issue, Virginia has given certain tools to shareholders and management, acting in the best interests of the corporation, to ensure that tender offers succeed only if they are consistent with the long-term interests of the corporation. Shareholders of Virginia corporations need not fear the coercive pressures of two-tiered tender offers or the prospect of corporate raiders seeking to extract greenmail by threatening to immediately dismantle and sell a corporation's assets.

Virginia need not define its corporations as other states do; it must only provide residents and nonresidents with equal access to them. *Id.* at 94. If Virginia believes that hostile tender offers have the potential to be harmful to the corporations that it creates and whose attributes it defines, then it is permitted to enact regulations designed to neutralize that harm. Tyson's argument that such a policy can lead to inefficient management would be better addressed to the Virginia legislature rather than this court. Whether these statutes may limit the number of successful tender offers does not substantially affect the Commerce Clause analysis. *Id.* at 93-94.

The Commerce Clause does not give Tyson a right to purchase WLR for $30 per share. It merely ensures that Tyson have a chance to do so equal to that of a Virginia resident offering $30 per share. The Virginia statutes do nothing to upset that equality. They make it more difficult for tender offerors, resident and nonresident alike, to gain control of a Virginia corporation. As a result, Tyson is unlikely to succeed on the merits of its Commerce Clause challenge.

VI.

The Virginia stautes, even when viewed as a scheme, are not preempted by the Williams Act and do not violate the Commerce Clause. Whatever the merits or demerits

of discouraging tender offers, the Constitution is not concerned with the wisdom of economic policy. "The Constitution does not require the States to subscribe to any particular economic theory." *Id.* at 92. Based on analysis of the four Blackwelder factors, Tyson's motion for a preliminary injunction is denied.

An appropriate Order shall this day issue.

ENTERED: James H. Michael, Jr., Judge

August 9, 1994
Date

ORDER

August 9, 1994, Filed, Entered

JUDGE JAMES H. MICHAEL, JR.

For the reasons stated in the accompanying Memorandum Opinion, it is this day

ADJUDGED AND ORDERED

that Tyson's May 2, 1994 Motion for a Preliminary Injunction based upon the asserted unconstitutionality of the four Virginia statutes affecting its takeover attempt shall be, and it hereby is, denied.

The Clerk of the Court is hereby directed to send a certified copy of this Order to all counsel of record.

ENTERED: James H. Michael, Jr., Judge

August 9, 1994.
Date

APPENDIX D

UNITED STATES DISTRICT COURT
W.D. VIRGINIA
HARRISONBURG DIVISION

Civ. A. No. 94-012-H

WLR FOODS, INC.,
Plaintiff,

v.

TYSON FOODS, INC.,
Defendant.

TYSON FOODS, INC. and WLR ACQUISITION CORP.,
Counterclaimants,

v.

WLR FOODS, INC., *et al.*,
Counterclaim-defendants.

June 1, 1994

MEMORANDUM OPINION AND ORDER

MICHAEL, District Judge.

The matter is now before the court on Tyson's objection, filed May 6, 1994, to the April 16, 25, and 28, 1994 nondispositive orders of the Magistrate Judge. Tyson objects to those orders to the extent they prevent Tyson

from inquiring, in discovery, into the substance of professional advice given to WLR in the face of Tyson's takeover attempt. The court finds no factual issues in dispute; the Magistrate Judge's orders therefore must stand unless they are contrary to law. Fed.R.Civ.P. 72(a).

At the center of the present matter is the Magistrate Judge's April 25, 1994 Memorandum Opinion and Order, which sets forth the Magistrate Judge's view of the Virginia statutory scheme as it bears on the issue of the extent to which courts may review actions taken by corporate directors. Specifically, Tyson objects to the Magistrate Judge's conclusions (and the orders following from it) that the Virginia standard of director conduct is a process-oriented one, not a substantive one as measured by Delaware law and traditional formulations of the business judgment rule. *See Unocal Corp. v. Mesa Petroleum Co.*, 493 A.2d 946 (Del.1985); *C-T of Virginia, Inc. v. Barrett*, 124 B.R. 689, 692 (W.D.Va.1990), *superseded by statute, WLR Foods, Inc. v. Tyson Foods, Inc.*, 155 F.R.D. 142 (W.D.Va. 1994). Tyson argues that the question of "good faith" decisionmaking under the relevant Virginia statute, Va.Code Ann. § 13.1-690 (Michie 1993), cannot be proven or disproved without inquiry into the substance of the advice WLR relied on in developing its response to Tyson's takeover attempt.

The court finds that the appropriate reading of the law is the one the Magistrate Judge has supplied. The court is struck by the fact that when it enacted § 13.1-690, the General Assembly generally chose to follow the lead of the Model Business Corporation Act except with regard to the Model Act's reasonableness standard for judging the propriety of director conduct. *Compare* Model Act § 8.30(a) *with* Va. Code Ann. § 13.1-690. *See* Daniel T. Murphy, *The New Virginia Stock Corporation Act: A Primer*, 20 U.Rich.L.Rev. 67, 104-109 (1985). This signals legislative rejection of a substantive evaluation of

director conduct, that is, evaluation in terms of the rationality of the conduct. Instead, courts are required to find some other indicia of "good faith business judgment of the best interests of the corporation," which is the standard to which directors are now held pursuant to § 13.1-690.

For the most part, the statute provides this indicia in subsection B, which creates something of a safe harbor for directors who rely on competent advice. § 13.1-690(B). This suggests that good faith is to be measured by the directors' resort to an informed decisionmaking process, not by the rationality of the decision ultimately taken. Of course, resort to the process must itself be undertaken in good faith: the directors must believe in good faith that their advisors are competent to render the advice sought, and they must be aware of no facts which would make reliance on that advice unwarranted. *See id.*

Thus, at some level, as Tyson suggests, there will be an inquiry into the director's subjective good faith. This is not to say, however, that this subjective good faith must be measured by the substantive soundness of the directors' actions. Certainly a reasonableness review of those actions would be useful in determining good faith, but this would thoroughly undermine the General Assembly's decision in § 13.1-690(A) to reject the Model Act's substantive component. As Magistrate Judge Crigler suggested on a related issue, this would accomplish by the back door that which is forbidden by the front.

Instead, the means of addressing good faith for Tyson must be in keeping with the procedural thrust of the statute. Neither the statute nor the Magistrate Judge's order would necessarily preclude, for instance, inquiry into the identity and qualifications of any sources of information or advice sought which bear on the decision reached, the circumstances surrounding selection of these sources, the general topics (but not the substance) of the information sought or imparted, whether advice was ac-

tually given, whether it was followed, and if not, what sources of information and advice *were* consulted to reach the decision in issue. In short, the statute permits inquiry into the procedural indicia of whether the directors resorted in good faith to an informed decisionmaking process.

The Fourth Circuit's decision in *Sandberg v. Virginia Bankshares, Inc.*, 891 F.2d 1112, 1123 (4th Cir. 1989), *rev'd and remanded on other grounds*, 501 U.S. 1083, 111 S. Ct. 2749, 115 L.Ed.2d 929 (1991) is not to the contrary. There, as WLR suggests, the Court found most salient the directors' failure to retain independent experts and their blind allegiance to the advice they received. *See id.* That sort of conduct would be as impermissible under this court's reading of § 690 as it would under a standard that would command a review of director action for reasonableness. Bald assertions of director prerogative to reach any sort of decision by any process would not suffice under either standard. And of course, as the Magistrate Judge pointed out, *Sandberg* never directly addressed the changes brought about in the law by § 690(A).

The same is true of a later incarnation of the *Sandberg* litigation, *Sandberg v. Virginia Bankshares*, 979 F.2d 332, 354 (4th Cir. 1992), *vacated*, 1993 WL 524680 (4th Cir. 1993), in which the Fourth Circuit held that shareholders had an interest in determining whether a majority shareholder had played a role in a challenged board decision. This concern would not necessarily require disclosure of the substance of the input the majority shareholder might have offered. Moreover, the Fourth Circuit was not confronted with a statutory limitation on such communications, as distinct from the attorney-client privilege asserted in that case against disclosure.

Tyson seeks to circumvent the implications of § 690, as the Magistrate Judge and this court have construed it, by arguing that the statute does not apply in this case.

One strand of this argument suggests that § 690 did not repeal common law standards of director conduct where director conflicts of interest are alleged, as here. As to conflicts not arising inherently from the takeover attempt (that is, between a director and the corporation), however, that jurisprudence finds expression in § 13.1-691. *See Izadpanah v. Boeing Joint Venture*, 243 Va. 81, 412 S.E.2d 708 (1992). The Magistrate Judge correctly pointed out that no reasonableness inquiry is suggested by that statute, nor inquiry into the advice the director received. As to conflicts arising out of a hostile takeover, the Virginia statutory scheme is clear that § 13.1-690 sets the standard for director actions taken in response to such a takeover. *See* §§ 13.1-646, 728.9.[1]

The same response applies to the second strand of Tyson's attempted evasion of § 690. This time, Tyson contends that § 690 only protects the individual directors from personal liability for misconduct and that the *Unocal* scheme under Delaware law governs even in Virginia as to injunctive suits challenging the board's actions. That scheme, unsurprisingly, commands an inquiry into the reasonableness of corporate action taken in the face of

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[1] Section 13.1-646 (share options) states, in relevant part: "Any action or determination by the board of directors with respect to the issuance, the terms and conditions or redemption of rights, options, or warrants shall be subject to the provisions of § 13.1-690 and shall be valid if taken or determined in compliance therewith."

Section 13.1-728.9 (nonexclusivity) states:

> Except as expressly provided in this article, neither the provisions of this article nor their application to any acquiring person shall limit actions that may be taken, or require the taking of any action, by the board of directors or shareholders with respect to any potential changes in control of any issuing public corporation. In the case of any action taken or not taken by directors, the provisions of § 13.1-690 shall apply, and, in determining the best interests of the corporation, a director may consider the possibility that those interests may best be served by the continued independence of the corporation.

a takeover. *See* 493 A.2d 946. Again, however, the General Assembly has insulated not only the directors, but the actions they have taken, so long as those actions were taken pursuant to § 690. *See* §§ 13.1-646, 728.9. Simply put, § 690 is the only state law avenue for challenge to WLR's measures taken in anticipation of Tyson's takeover attempt. If there remain such common law avenues at all, they are not implicated here.

The court is similarly unpersuaded by Tyson's argument that WLR somehow waived its privilege not to communicate the substance of advice it received by seeking a declaratory judgment in this case to the effect that its actions were undertaken in good faith. As the court has already held, the "privilege" in issue here is statutory, governed by § 690. WLR's request for a declaration that its conduct complies with that statutory standard by no means places in issue the substance of the advice it received, for as the court has now held, this kind of information is not relevant under § 690.

Lastly, Tyson claims that a failure to permit discovery on the substance of advice WLR received will lead to wasteful rediscovery if this court's § 690 construction is overruled on appeal. Tyson claims that any such discovery would be subject to an appropriate protective order. This, as the Magistrate Judge commented, is a "discover now, argue later" approach to this issue. The court's holding simply makes irrelevant, however, the substance of advice given. The Magistrate Judge therefore was correct, based on a similar holding, to conclude that the advice was not "reasonably calculated to lead to the discovery of admissible evidence," and therefore was not discoverable pursuant to Fed.R.Civ.P. 26(b)(1).

For these reasons, it is this day

ADJUDGED AND ORDERED

that Tyson's May 6, 1994 objection to the April 16, 25, and 28, 1994 nondispositive orders of the Magistrate Judge shall be, and it hereby is, overruled.

APPENDIX E

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF VIRGINIA
HARRISONBURG DIVISION

Civil Action No. 94-012-H

WLR FOODS, INC.,
Plaintiff,

v.

TYSON FOODS, INC.,
Defendant,

and

TYSON FOODS, INC. and WLR ACQUISITION CORP.,
Counterclaimants,

v.

WLR FOODS, INC., *et als.*,
Counter-defendants.

June 21, 1994, Decided
June 21, 1994, Filed, Entered

MEMORANDUM OPINION

JUDGE JAMES H. MICHAEL, JR.

Tyson Foods, Inc. (Tyson) has commenced a hostile attempt to takeover WLR Foods, Inc. (WLR). WLR has filed suit seeking a declaratory judgment affirming various measures undertaken by WLR to defend against Tyson's

takeover attempt. Tyson has counterclaimed, asserting that such measures are illegal and that the Virginia statutory scheme regulating hostile takeover attempts is unconstitutional.

The only issues before the court at this time are whether WLR's Board of Directors properly set the record date to determine which shareholders may vote in the control share referendum, and whether four directors (George Bryan, Herman Mason, Charles Wampler, and William Wampler) who resigned as employees of WLR before the record date should be permitted to vote in the referendum. Tyson's motion for preliminary injunction is denied.

I.

Hostile takeover attempts in Virginia are governed in part by the Virginia Control Share Act, Va. Code §§ 13.1-728.1 to 13.1-728.9. The Act states that any shares acquired in a control share acquisition [1] have no voting rights, unless a majority of shareholders entitled to vote grants such voting rights. Va. Code § 13.1-728.3. Interested shares may not vote in the control share referendum. Id.

In order to defend against Tyson's takeover attempt, WLR took several actions at a February 4, 1994 meeting of its Board of Directors. Three of those actions are pertinent to the issues currently before the court. First, the Board amended WLR's bylaws to set the record date for a control share referendum as the date on which Tyson submitted its control share acquisition statement.[2] Tyson

[1] In pertinent part, a "control share acquisition" is defined as an acquisition of at least 20% of the voting shares of a Virginia corporation in which the target corporation does not wish to be acquired, i.e. a hostile takeover. Va. Code § 13.1-728.1. No party disputes that what Tyson is attempting qualifies as a control share acquisition.

[2] Virginia Code § 13.1-728.4 requires Tyson to submit to WLR a control share acquisition statement, which must provide certain details of Tyson's position and intentions with respect to its attempted control share acquisition.

filed this statement on April 14, 1994, establishing that date as the record date. Secondly, four members of the Board of Directors resigned as employees of WLR. Lastly, the Board of Directors amended WLR's bylaws to make clear that the Chairman and Vice Chairman of the Board are officers of the Board of Directors, but they are not officers of WLR. The final two measures were designed to enable the four Directors to vote in the control share referendum. The subject of this preliminary injunction motion is the validity of these three actions pursuant to the Virginia Control Share Act. Other issues are saved for another day.

II.

In deciding whether to issue a preliminary injunction, the court must consider four factors: (1) the likelihood of irreparable harm to Tyson without the injunction; (2) the likelihood of harm to WLR with the injunction; (3) Tyson's likelihood of success on the merits; and (4) the public interest. *Blackwelder Furniture Co. v. Seilig Mfg. Co.*, 550 F.2d 189, 193-96 (4th Cir. 1977). These four factors are to be weighed flexibly based on a sliding-scale approach, and a strong showing by a party with regard to one factor reduces the need for that party to make a strong showing on other factors. *Dan River, Inc. v. Icahn*, 701 F.2d 278, 283 (4th Cir. 1983) (citing *North Carolina State Ports v. Dart Containerline Co.*, 592 F.2d 749, 750 (4th Cir. 1979)).

As previously stated, the issues before the court are particularly narrow and involve only the validity of the Directors' actions pursuant to the Control Share Act. As a result of the court's uniquely narrow inquiry, the only potential harm to Tyson is a skewing of the results of the control share referendum caused by the four director's votes being counted and the particular record date chosen by WLR. The referendum took place on May 21, 1994, and in order to prevail Tyson needed a majority of shares eligible to vote. Va. Code § 13.1-728.3. Tyson received

only 3,152,830 votes out of 10,896,672 shares eligible to vote, including shares held by the four directors and their associates.[3] Even if all of them were excluded, however, the number of shares eligible to vote would have fallen to 9,500,742, giving Tyson only 33% of shares eligible to vote, far less than the majority that it needed. In fact, given the number of shares that were voted for Tyson, in order for Tyson to prevail the number of shares eligible to vote would have to fall to 6,305,659. That would entail excluding more than three times the 1,395,930 shares challenged by Tyson.[4] Clearly, given the results of the control share referendum, Tyson will suffer little, if any, harm if its motion for a preliminary injunction is denied. The vote simply would not have come out differently.

Because of the apparent lack of harm to Tyson, the likelihood of success on the merits must weigh heavily in Tyson's favor in order for it to prevail. The likelihood of each party's success on the merits turns on the validity of the actions taken by WLR's Board of Directors pursuant to the Virginia Control Share Act. In addition, as expressed by the Virginia legislature, the public interest is served by allowing the Control Share Act to dictate the procedures to be followed in hostile takeovers. As a result, in weighing the Blackwelder factors the court now must address the validity of the directors' actions pursuant to

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[3] Of the 1.833 million shares challenged by Tyson, 1,395,930 were counted as eligible to vote and the remainder was excluded.

[4] One extremely unlikely scenario exists in which Tyson could have prevailed. If all of the votes challenged by Tyson were excluded, the number of shares eligible to vote would fall to 9,500,742. In addition, 1,603,800 shares were counted as eligible to vote but did not do so. If every one of these shares was prevented from voting because of the manner in which WLR set the record date, and if every one of them would have voted for Tyson, then Tyson would have received 4,756,630 votes out of 9,500,742 eligible shares. This would give Tyson approximately 50.066% of the vote. Notwithstanding, the court considers this scenario unrealistic.

the Control Share Act. Whether these actions violated any other provisions of law is not at issue and does not affect the court's decision.

III.

The first matter before the court is the validity of the record date set to determine which shares may vote in the control share referendum. WLR's Board of Dirctors fixed the record date as the date on which Tyson submits its control share acquisition statement, which was done on April 14, 1994. Tyson contends that the record date was set in this manner in order to deprive the marketplace of adequate notice by preventing shareholders who purchased their shares after the record date from voting in the control share referendum. This argument assumes that those who sell their shares before the record date will not be concerned enough to vote. Tyson alleges that WLR did this in order to increase the number of shares which are not voted in the control share referendum, and this harms Tyson because § 13.1-728.3 requires that Tyson receives a majority of shares eligible to vote. WLR responds that it set the record date as it did in order to prevent Tyson from manipulating the rules of the Control Share Act by acquiring by some means shares in the time period between the filing of the control share acquisition statement and the record date—asserted by Tyson to be between five (5) and ten (10) days—and then placing those acquired shares in friendly hands for the purpose of voting in the control share referendum.

Regardless of the benefits or drawbacks to either party of a particular record date, WLR plainly is permitted to set the record date as it has done in this case. Virginia Code § 13.1-660(A) states: "The bylaws may fix or provide the manner of fixing in advance the record date for one or more voting groups in order to make a determination of shareholders for any purpose." The only limitation on the Board's authority contained in § 13.1-660 provides that the record date may not be more than seventy days

before the shareholder meeting or action for which the determination of shareholders is required. Id. § 13.1-660(B). The only other limitation set by Virginia law is contained in Va. Code § 13.1-690, which sets the standard for director conduct as "good faith business judgment". This court previously has ruled in this case that pursuant to § 13.1-690 "good faith is to be measured by the directors' resort to an informed decisionmaking process, not by the rationality of the decision ultimately taken." *WLR Foods, Inc. v. Tyson Foods, Inc.*, 857 F. Supp. 492, 1994 WL 241834, at *1 (W.D. Va. June 1, 1994). There is no dispute that WLR's directors, undertook an informed decisionmaking process with regard to the selection of a record date.[5] As a result, the record date is valid pursuant to Virginia law.

IV.

Tyson next asserts that the four directors who resigned as employees on February 4, 1994 should not be permitted to vote their shares in the control share referendum. Virgina Code § 13.1-728.1(B) prohibits "interested shares," as determined on the record date, from voting in the control share referendum, and "interested shares" is defined as shares of WLR held by the following persons: (1) the acquiring person, i.e. Tyson; (2) any officer of the target corporation; and (3) any employee of the target corpora-

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[5] Even if this court reviewed the substantive rationality of the directors' decision to set the record date as they did, clearly their decision should stand. Despite Tyson's protests, a certain number of shares purchased near the time of the record date would not be able to vote regardless of the particular date chosen. In addition, all shares must be owned by someone on the record date, even if the owner is someone who has since sold the shares and is less likely to vote. WLR's asserted desire to prevent any party from manipudating the Control Share Act by placing shares in disinterested hands prior to a record date announced in advance rather than without notice certainly qualifies as a rational decision.

tion who is also a director of the corporation.[6] Id. § 13.1-728.1. Shares are interested not only if they are held by any of the above persons, but also if they are held by such person's "associates," which includes: (1) any person who controls or is controlled by an interested person or who acts jointly or in concert with an interested person in connection with the acquisition or exercise of beneficial ownership over shares; (2) any organization for which an interested person functions as an officer, director, or partner; (3) any person having beneficial ownership over ten per cent or more of any class of equity securities issued by an interested person; (4) any trust or estate in which an interested person has a beneficial interest or serves in a fiduciary capacity; and (5) any relative or spouse or relative of such spouse who has the same residence as an interested person. Tyson alleges that the four directors and their associates hold approximately 1.833 million shares of WLR,[7] and those shares should be excluded from the control share referendum because they are interested.

WLR freely admits that the directors resigned as employees for the purpose of voting their shares in the control share referendum. Their motive for resigning, however, is not relevant to deciding whether their shares are interested. Va. Code § 13.1-728.3 plainly states that the determination of which shares are interested is to be made as of the record date. There is no exclusion for shares held by a person who formerly was an employee but remains a director on the record date. The legislature apparently decided that a director/employee could choose that the benefits of voting in a control share refer-

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[6] Because the term "employees" includes officers, Va. Code § 13.1-603, and it is not disputed that the four men were directors on the record date, their shares are interested shares if they were employees of WLR on the record date, regardless of whether they were officers.

[7] WLR has slightly less than 11 million shares outstanding, so the disputed shares represent approximately seventeen percent of the shares outstanding.

endum outweigh the benefits derived from remaining an employee. Whether one is an employee, however, must be determined based on one's functions and duties. See, e.g., *Reliance Elec. Co. v. Emerson Elec. Co.*, 404 U.S. 418, 425 n.4, 30 L. Ed. 2d 575, 92 S. Ct. 596 (1972); *Gold v. Sloan*, 486 F.2d 340, 351 (4th Cir. 1973); see also Va. Code § 13.1-603 ("A director may accept duties that might make him an employee.") (emphasis added). In this case, the four directors resigned as employees on February 4, 1994 and the record date was April 14, 1994. Whether the four directors may vote their shares, therefore, turns on whether they truly resigned or whether they continued to function as employees as of April 14, 1994.

Tyson presented no direct evidence that the four directors continued to function as employees as of April 14, 1994. Instead, it attempted to demonstrate that they were employees before April 14 and that as of April 14 they performed the same functions as they did before they resigned. WLR contends, however, that the four directors had not functioned as employees for quite some time, and the February 4 resignations were intended merely to clarify their roles within WLR. After considering all of the evidence, the court concludes that the four directors in question were not employees on the record date.

Charles Wampler is Chairman of the Board of Directors of WLR, and on February 4, 1994 WLR amended its bylaws to make the Chairman and Vice Chairman officers of the Board of Directors, and not officers of the company. WLR claims that he has not been involved in active management of daily operations for decades. As of April 14, 1994 his only function was as Chairman of the Board. He did not report to anyone and no one reported to him. He signed no checks on WLR's behalf, and he had no authority to direct other WLR employees. When he resigned as an employee, he gave up his salary

of approximately $50,000 per year and has not received a salary since then. His only connection with WLR's daily operations occurs when he gives advice during his occasional walks through WLR's plants and his talks with WLR's growers. No evidence was presented that his advice is ever followed.

Herman Mason is Vice Chairman of the Board of Directors and was Chief Executive Officer of WLR until 1988, when he announced his retirement at a meeting of the National Turkey Federation. Since 1988, his only role other than as a director has been to act as a "sounding board" for the current Chief Executive Officer, James Keeler. Keeler is free to follow or disregard Mason's advice, as he sees fit. As of April 14, 1994 Mason no longer received a salary, gave no orders, had no secretary, could not hire or fire on WLR's behalf, and shared a desk at WLR's headquarters; which he used only to receive his mail. Although after February 4, 1994 he helped Keeler select the advisors used by WLR in connection with Tyson's takeover attempt, the court views that function as an appropriate one for a director and unconnected with WLR's daily activities or management of its operations.

William Wampler and George Bryan are even less connected with WLR's operations than are Charles Wampler and Herman Mason. William Wampler formerly was a Senior Vice President, but since his resignation on February 4, 1994 he no longer receives a salary, has no office, has no secretary, and neither gives nor takes orders. George Bryan has not been connected with the operations of WLR since the early 1970s, although he is still a director and retained the title of Senior Vice President until February 4, 1994. After his February 4 resignation, he no longer received a salary, had no office or secretary, had no authority to hire or fire, and neither gave nor took any orders. Even before February 4 Bryan

rarely came to WLR's offices except for meetings of the Board of Directors. In fact, he has been seriously ill and has not performed any functions for WLR since before February 4, 1994.

Other than director's fees, the only benefit that the four directors still receive from WLR is lifetime health insurance benefits. Tyson maintains that this is a disguised effort to compensate them for services as employees, rather than a provision of post-retirement benefits. WLR presented evidence, however, that it previously has given lifetime health insurance benefits to nine other high-ranking officers after they retired. WLR asserts that it has a history of being loyal to former employees who have given a lot to the company. Based on this track record, the court finds that even if the health benefits given to the four directors were as probative as the duties that they performed as of the record date, the health benefits were retirement benefits rather than compensation for current services.

Tyson also presented evidence that WLR designated the four directors as employees as recently as October of 1993 in various filings with the Securities and Exchange Commission and the State Corporation Commission. Furthermore, WLR told its shareholders in its 1993 proxy statement that the four directors were officers who were crucial to WLR's continued success. Despite this, Tyson presented little, if any, evidence that any of the four directors performed any duties that would qualify them as employees. The documents cited by Tyson were filed before the February 4, 1994 resignations of the four directors.[8] As a result, the documents listing the four

[8] The only document filed after February 4, 1994 is WLR's Annual Report to the State Corporation Commission. This document deleted George Bryan, Herman Mason, and Charles Wampler as officers of WLR and designated them solely as directors. William Wampler, however, was deleted as a director and remained as an officer. If he was designated as both an officer and a director his

directors as employees do not persuade the court that they were employees anytime after their resignations on February 4, 1994. Tyson, however, asserts that because WLR does not dispute that the four directors performed essentially the same functions as of April 14, 1994 as they did before February 4, 1994 the documents show that they were, and still are, employees of WLR. As stated previously, what is most important in determining their employment status, however, is their duties and functions rather than simply a nominal designation as employees. Evidence relating to their role, or lack thereof, in the operations of WLR both before and after their February 4 resignations is more forceful than evidence that the four directors were designated as employees on documents filed in 1993.

After weighing all of the evidence, the court finds that on April 14, 1994 George Bryan, Herman Mason, Charles Wampler, and William Wampler were not employees of WLR. As a result, the shares that they hold are not interested shares as defined by Va. Code § 13.1-728.1, and the Control Share Act does not prevent them from voting their shares in the control share referendum. In addition, because their shares are not interested shares, shares held by their associates cannot be classified as interested by virtue of their association. Officers and director/employees of WLR may not vote in the control share referendum, but the four directors in question do not fit within those categories.

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identification as such would warrant more careful consideration, but the court considers the designation of William Wampler as an officer rather than a director to be an inadvertent error. Although the wrong box was marked on the form, his title on the form was changed from Senior Vice President to Director. Also, no party contends that William Wampler stopped acting as a director after February 4, 1994, but the designation by WLR, if intentional, indicates that he did. Lastly, WLR filed an amended report with the State Corporation Commission correcting the error.

V.

Pursuant to the narrow issues before the court, Tyson's motion for a preliminary injunction is hereby denied. Tyson will suffer very little harm as a result of the denial, and the three actions at issue in this proceeding do not violate the Virginia Control Share Act. As a result, the four Blackwelder factors weigh heavily in WLR's favor.

An appropriate Order shall this day issue.

ENTERED: James H. Michael, Jr., Judge

June 21, 1994

Date

ORDER

June 21, 1994, Filed

JUDGE JAMES H. MICHAEL, JR.

For the reasons stated in the accompanying Memorandum Opinion, it is this day

ADJUDGED AND ORDERED

that:

Tyson Food, Inc.'s May 3, 1994 Motion for a preliminary injunction shall be, and it hereby is, denied. As a result, based on information contained in the Affidavit of Gayle S. Payne, designated as Plaintiff's Exhibit #204:

1. The 304,046 shares of WLR Foods, Inc. stock held by George E. Bryan and his associates are not interested shares for the purpose of voting in the May 21, 1994 control share referendum.

2. The 197,612 shares of WLR Foods, Inc. stock held by Herman D. Mason and his associates are not interested shares for the purpose of voting in the May 21, 1994 control share referendum.

3. The 347,989 shares of WLR Foods, Inc. stock held by Charles W. Wampler, Jr. and his associates are not interested shares for the purpose of voting in the May 21, 1994 control share referendum.

4. The 423,272 shares of WLR Foods, Inc. stock held by William D. Wampler and his associates are not interested shares for the purpose of voting in the May 21, 1994 control share referendum.

5. The 40,003 shares of WLR Foods, Inc. stock held by James L. Keeler and his associates are interested shares for the purpose of voting in the May 21, 1994 control share referendum.

6. The 350 shares of WLR Foods, Inc. stock held by Delbert L. Seitz and his associates are interested shares for the purpose of voting in the May 21, 1994 control share referendum.

7. The 43,346 shares of WLR Foods, Inc. stock held by James L. Mason and his associates are interested shares for the purpose of voting in the May 21, 1994 control share referndum.

8. The 1,597 shares of WLR Foods, Inc. stock held by Jane T. Brookshire and her associates are interested shares for the purpose of voting in the May 21, 1994 control share referendum.

9. The 33 shares of WLR Foods, Inc. stock held by Gayle S. Payne and her associates are interested shares for the purpose of voting in the May 21, 1994 control share referndum.

10. All other shares of WLR Foods, Inc. stock held by persons, and the associates of such persons, not previously mentioned in this Order but listed in the Affidavit of Gayle S. Payne, designated as Plaintiff's Exhibit #204, are not interested shares for the purpose of voting in the May 21, 1994 control share referendum.

The clerk is hereby directed to send a certified copy of this Order, and the accompanying Memorandum Opinion, to all counsel of record.

ENTERED: James H. Michael, Jr., Judge

June 21, 1994
Date

APPENDIX F

EXCERPTS FROM UNITED STATES CODE

Title 15 U.S.C. §§ 78m(d)-(e), 78n(d)-(f)

Title 15 U.S.C. § 78m(d)-(e)

(d) Reports by persons acquiring more than five per centum of certain classes of securities

(1) Any person who, after acquiring directly or indirectly the beneficial ownership of any equity security of a class which is registered pursuant to section 78*l* of this title, or any equity security of an insurance company which would have been required to be so registered except for the exemption contained in section 78*l*(g)(2)(G) of this title, or any equity security issued by a closed-end investment company registered under the Investment Company Act of 1940 [15 U.S.C. 80a-1 et seq.] or any equity security issued by a Native Corporation pursuant to section 1629c(d)(6) of title 43, is directly or indirectly the beneficial owner of more than 5 per centum of such class shall, within ten days after such acquisition, send to the issuer of the security at its principal executive office, by registered or certified mail, send to each exchange where the security is traded, and file with the Commission, a statement containing such of the following information, and such additional information, as the Commission may by rules and regulations prescribe as necessary or appropriate in the public interest or for the protection of investors—

(A) the background, and identity, residence, and citizenship of, and the nature of such beneficial ownership by, such person and all other persons by whom or on whose behalf the purchases have been or are to be effected;

(B) the source and amount of the funds or other consideration used or to be used in making the pur-

chases, and if any part of the purchase price is represented or is to be represented by funds or other consideration borrowed or otherwise obtained for the purpose of acquiring, holding, or trading such security, a description of the transaction and the names of the parties thereto, except that where a source of funds is a loan made in the ordinary course of business by a bank, as defined in section 78c(a)(6) of this title, if the person filing such statement so requests, the name of the bank shall not be made available to the public;

(C) if the purpose of the purchases or prospective purchases is to acquire control of the business of the issuer of the securities, any plans or proposals which such persons may have to liquidate such issuer, to sell its assets to or merge it with any other persons, or to make any other major change in its business or corporate structure;

(D) the number of shares of such security which are beneficially owned, and the number of shares concerning which there is a right to acquire, directly or indirectly, by (i) such person, and (ii) by each associate of such person, giving the background, identity, residence, and citizenship of each such associate; and

(E) information as to any contracts, arrangements, or understandings with any person with respect to any securities of the issuer, including but not limited to transfer of any of the securities, joint ventures, loan or option arrangements, puts or calls, guaranties of loans, guaranties against loss or guaranties of profits, division of losses or profits, or the giving or withholding of proxies, naming the persons with whom such contracts, arrangements, or understandings have been entered into, and giving the details thereof.

(2) If any material change occurs in the facts set forth in the statements to the issuer and the exchange, and in the statement filed with the Commission, an amendment shall be transmitted to the issuer and the exchange and shall be filed with the Commission, in accordance with such rules and regulations as the Commission may prescribe as necessary or appropriate in the public interest or for the protection of investors.

(3) When two or more persons act as a partnership, limited partnership, syndicate, or other group for the purpose of acquiring, holding, or disposing of securities of an issuer, such syndicate or group shall be deemed a "person" for the purposes of this subsection.

(4) In determining, for purposes of this subsection, any percentage of a class of any security, such class shall be deemed to consist of the amount of the outstanding securities of such class, exclusive of any securities of such class held by or for the account of the issuer or a subsidiary of the issuer.

(5) The Commission, by rule or regulation or by order, may permit any person to file in lieu of the statement required by paragraph (1) of this subsection or the rules and regulations thereunder, a notice stating the name of such person, the number of shares of any equity securities subject to paragraph (1) which are owned by him, the date of their acquisition and such other information as the Commission may specify, if it appears to the Commission that such securities were acquired by such person in the ordinary course of his business and were not acquired for the purpose of and do not have the effect of changing or influencing the control of the issuer nor in connection with or as a participant in any transaction having such purpose or effect.

(6) The provisions of this subsection shall not apply to—

(A) any acquisition or offer to acquire securities made or proposed to be made by means of a registra-

tion statement under the Securities Act of 1933 [15 U.S.C. 77a et seq.];

(B) any acquisition of the beneficial ownership of a security which, together with all other acquisitions by the same person of securities of the same class during the preceding twelve months, does not exceed 2 per centum of that class;

(C) any acquisition of any equity security by the issuer of such security;

(D) any acquisition or proposed acquisition of a security which the Commission, by rules or regulations or by order, shall exempt from the provisions of this subsection as not entered into for the purpose of, and not having the effect of, changing or influencing the control of the issuer or otherwise as not comprehended within the purposes of this subsection.

(e) Purchase of securities by issuer

(1) It shall be unlawful for an issuer which has a class of equity securities registered pursuant to section 78*l* of this title, or which is a closed-end investment company registered under the Investment Company Act of 1940 [15 U.S.C. 80a-1 et seq.], to purchase any equity security issued by it if such purchase is in contravention of such rules and regulations as the Commission, in the public interest or for the protection of investors, may adopt (A) to define acts and practices which are fraudulent, deceptive, or manipulative, and (B) to prescribe means reasonably designed to prevent such acts and practices. Such rules and regulations may require such issuer to provide holders of equity securities of such class with such information relating to the reasons for such purchase, the source of funds, the number of shares to be purchased, the price to be paid for such securities, the method of purchase, and such additional information, as the Commission deems necessary or appropriate in the public interest or for the protection of investors, or which the

Commission deems to be material to a determination whether such security should be sold.

(2) For the purpose of this subsection, a purchase by or for the issuer or any person controlling, controlled by, or under common control with the issuer, or a purchase subject to control of the issuer or any such person, shall be deemed to be a purchase by the issuer. The Commissioner shall have power to make rules and regulations implementing this paragraph in the public interest and for the protection of investors, including exemptive rules and regulations covering situations in which the Commission deems it unnecessary or inappropriate that a purchase of the type described in this paragraph shall be deemed to be a purchase by the issuer for purposes of some or all of the provisions of paragraph (1) of this subsection.

(3) At the time of filing such statement as the Commission may require by rule pursuant to paragraph (1) of this subsection, the person making the filing shall pay to the Commission a fee of 1/50 of 1 per centum of the value of securities proposed to be purchased. The fee shall be reduced with respect to securities in an amount equal to any fee paid with respect to any securities issued in connection with the proposed transaction under section 6(b) of the Securities Act of 1933 [15 U.S.C. 77f(b)], or the fee paid under that section shall be reduced in an amount equal to the fee paid to the Commission in connection with such transaction under this paragraph.

Title 15 U.S.C. § 78n(d)-(f)

(d) Tender offer by owner of more than five per centum of class of securities; exceptions

(1) It shall be unlawful for any person, directly or indirectly, by use of the mails or by any means or instrumentality of interstate commerce or of any facility of a national securities exchange or otherwise, to make a tender offer for, or a request or invitation for tenders of, any

class of any equity security which is registered pursuant to section 78*l* of this title, or any equity security of an insurance company which would have been required to be so registered except for the exemption contained in section 78*l*(g)(2)(G) of this title, or any equity security issued by a a closed-end investment company registered under the Investment Company Act of 1940 [15 U.S.C. 80a-1 et seq.], if, after consummation thereof, such person would, directly or indirectly, be the beneficial owner of more than 5 per centum of such class, unless at the time copies of the offer or request or invitation are first published or sent or given to security holders such person has filed with the Commission a statement containing such of the information specified in section 78m(d) of this title, and such additional information as the Commission may by rules and regulations prescribe as necessary or appropriate in the public interest or for the protection of investors. All requests or invitations for tenders or advertisements making a tender offer or requesting or inviting tenders of such a security shall be filed as a part of such statement and shall contain such of the information contained in such statement as the Commission may by rules and regulations prescribe. Copies of any additional material soliciting or requesting such tender offers subsequent to the initial solicitation or request shall contain such information as the Commission may by rules and regulations prescribe as necessary or appropriate in the public interest or for the protection of investors, and shall be filed with the Commission not later than the time copies of such material are first published or sent or given to security holders. Copies of all statements, in the form in which such material is furnished to security holders and the Commission, shall be sent to the issuer not later than the date such material is first published or sent or given to any security holders.

(2) When two or more persons act as a partnership, limited partnership, syndicate, or other group for the purpose of acquiring, holding, or disposing of securities

of an issuer, such syndicate or group shall be deemed a "person" for purposes of this subsection.

(3) In determining, for purposes of this subsection, any percentage of a class of any security, such class shall be deemed to consist of the amount of the outstanding securities of such class, exclusive of any securities of such class held by or for the account of the issuer or a subsidiary of the issuer.

(4) Any solicitation or recommendation to the holders of such a security to accept or reject a tender offer or request or invitation for tenders shall be made in accordance with such rules and regulations as the Commission may prescribe as necessary or appropriate in the public interest or for the protection of investors.

(5) Securities deposited pursuant to a tender offer or request or invitation for tenders may be withdrawn by or on behalf of the depositor at any time until the expiration of seven days after the time definitive copies of the offer or request or invitation are first published or sent or given to security holders, and at any time after sixty days from the date of the original tender offer or request or invitation, except as the Commission may otherwise prescribe by rules, regulations, or order as necessary or appropriate in the public interest or for the protection of investors.

(6) Where any person makes a tender offer, or request or invitation for tenders, for less than all the outstanding equity securities of a class, and where a greater number of securities is deposited pursuant thereto within ten days after copies of the offer or request or invitation are first published or sent or given to security holders than such person is bound or willing to take up and pay for, the securities taken up shall be taken up as nearly as may be pro rata, disregarding fractions, according to the number of securities deposited by each depositor. The provisions of this subsection shall also apply to securities deposited within ten days after notice of an increase in the consideration offered to security holders, as described

in paragraph (7), is first published or sent or given to security holders.

(7) Where any person varies the terms of a tender offer or request or invitation for tenders before the expiration thereof by increasing the consideration offered to holders of such securities, such person shall pay the increased consideration to each security holder whose securities are taken up and paid for pursuant to the tender offer or request or invitation for tenders whether or not such secuities have been taken up by such person before the variation of the tender offer or request or invitation.

(8) The provisions of this subsection shall not apply to any offer for, or request or invitation for tenders of, any security—

(A) if the acquisition of such security, together with all other acquisitions by the same person of securities of the same class during the preceding twelve months, would not exceed 2 per centum of that class;

(B) by the issuer of such security; or

(C) which the Commission, by rules or regulations or by order, shall exempt from the provisions of this subsection as not entered into for the purpose of, and not having the effect of, changing or influencing the control of the issuer or otherwise as not comprehended within the purposes of this subsection.

(e) Untrue statement of material fact or omission of fact with respect to tender offer

It shall be unlawful for any person to make any untrue statement of a material fact or omit to state any material fact necessary in order to make the statements made in the light of the circumstances under which they are made, not misleading, or to engage in any fraudulent, deceptive, or manipulative acts or practices, in connection with any tender offer or request or invitation for tenders, or any

solicitation of security holders in opposition to or in favor of any such offer, request, or invitation. The Commission shall, for the purposes of this subsection, by rules and regulations define, and prescribe means reasonably designed to prevent, such acts and practices as are fraudulent, deceptive, or manipulative.

(f) Election or designation of majority of directors of issuer by owner of more than five per centum of class of securities at other than meeting of security holders

If, pursuant to any arrangement or understanding with the person or persons acquiring securities in a transaction subject to subsection (d) of this section or subsection (d) of section 78m of this title, any persons are to be elected or designated as directors of the issuer, otherwise than at a meeting of security holders, and the person so elected or designated will constitute a majority of the directors of the issuer, then, prior to the time any such person takes office as a director, and in accordance with rules and regulations prescribed by the Commission, the issuer shall file with the Commission, and transmit to all holders of record of securities of the issuer who would be entitled to vote at a meeting for election of directors, information substantially equivalent to the information which would be required by subsection (a) or (c) of this section to be transmitted if such person or persons were nominees for election as directors at a meeting of such security holders.

APPENDIX G

EXCERPTS FROM THE VIRGINIA CODE

§ 13.1-646. Share options.—A. Unless reserved to the shareholders in the articles of incorporation and subject to the provisions of § 13.1-651, a corporation may create or issue rights, options or warrants for the purchase of shares of the corporation upon such terms and conditions and for such consideration, if any, and such purposes as may be approved by the board of directors.

B. Notwithstanding the provisions of subsection A of § 13.1-638, the terms and conditions of rights, options or warrants created or issued by a corporation may include, without limitation, restrictions or conditions that preclude or limit the exercise, transfer or receipt thereof by designated persons or classes of persons or that invalidate or void such rights, options, or warrants held by designated persons or classes of persons. Any action or determination by the board of directors with respect to the issuance, the terms and conditions or redemption of rights, options, or warrants shall be subject to the provisions of § 13.1-690 and shall be valid if taken or determined in compliance therewith. (1985, c. 522; 1986, c. 74; 1988, c. 442; 1990, c. 423; 1992, c. 472.)

§ 13.1-690. General standards of conduct for director.—A. A director shall discharge his duties as a director, including his duties as a member of a committee, in accordance with his good faith business judgment of the best interests of the corporation.

B. Unless he has knowledge or information concerning the matter in question that makes reliance unwarranted, a director is entitled to rely on information, opinions, reports or statements, including financial statements and other financial data, if prepared or presented by:

1. One or more officers or employees of the corporation whom the director believes, in good faith, to be reliable and competent in the matters presented;

2. Legal counsel, public accountants, or other persons as to matters the director believes, in good faith, are within the person's professional or expert competence; or

3. A committee of the board of directors of which he is not a member if the director believes, in good faith, that the committee merits confidence.

C. A director is not liable for any action taken as a director, or any failure to take any action, if he performed the duties of his office in compliance with this section.

D. A person alleging a violation of this section has the burden of proving the violation. (Code 1950, §§ 13-206, 13-207, 13.1-44; 1956, c. 428; 1985, c. 522.)

§ 13.1-725. Definitions.—For purposes of this article:

An *"affiliate"* means a person that directly, or indirectly through one or more intermediaries, controls, is controlled by, or is under common control with the person specified.

An *"affiliated transaction"* means any of the following transactions:

1. Any merger of the corporation or any of its subsidiaries with any interested shareholder or with any other corporation that immediately after the merger would be an affiliate of an interested shareholder that was an interested shareholder immediately before the merger;

2. Any share exchange pursuant to § 13.1-717 in which any interested shareholder acquires one or more classes or series of voting shares of the corporation or any of its subsidiaries;

3. Except for transactions in the ordinary course of business, (i) any sale, lease, exchange, mortgage, pledge,

transfer or other disposition (in one transaction or a series of transactions) to or with any interested shareholder of any assets of the corporation or of any of its subsidiaries having an aggregate fair market value in excess of five percent of the corporation's consolidated net worth as of the date of the most recently available financial statements, or (ii) any guaranty by the corporation or any of its subsidiaries (in one transaction or a series of transactions) of indebtedness of any interested shareholder in an amount in excess of five percent of the corporation's consolidated net worth as of the date of the most recently available financial statements;

4. The sale or other disposition by the corporation or any of its subsidiaries to an interested shareholder (in one transaction or a series of transactions) of any voting shares of the corporation or any of its subsidiaries having an aggregate fair market value in excess of five percent of the aggregate fair market value of all outstanding voting shares of the corporation as of the determination date except pursuant to a share divided or the exercise of rights or warrants distributed or offered on a basis affording substantially proportionate treatment to all holders of the same class or series of voting shares;

5. The dissolution of the corporation if proposed by or on behalf of an interested shareholder; or

6. Any reclassification of securities, including any reverse stock split, or recapitalization of the corporation, or any merger of the corporation with any of its subsidiaries or any distribution or other transaction, whether or not with or into or otherwise involving an interested shareholder, which has the effect, directly or indirectly (in one transaction or a series of transactions), of increasing by more than five percent the percentage of the outstanding voting shares of the corporation or any of its subsidiaries beneficially owned by any interested shareholder.

The "*announcement date*" means the date of the first general public announcement of the proposed affiliated transaction or of the intention to propose an affiliated transaction or the date on which the proposed affiliated transaction or the intention to propose an affiliated transaction is first communicated generally to shareholders of the corporation, whichever is earlier.

An "*associate*" means as to any specified person:

1. Any entity, other than the corporation and any of its subsidiaries, of which such person is an officer, director, or general partner or is the beneficial owner of ten percent or more of any class of voting shares;

2. Any trust or other estate in which such person has a substantial beneficial interest or as to which such person serves as trustee or in a similar fiduciary capacity; and

3. Any relative or spouse of such person, or any relative of such spouse, who has the same home as such person or who is an officer or director of the corporation or any of its affiliates.

A person is deemed to be a "*beneficial owner*" of voting shares as to which such person and such person's affiliates and associates, individually or in the aggregate, have or share directly, or indirectly through any contract, arrangement, understanding, relationship, or otherwise:

1. Voting power, which includes the power to vote or to direct the voting of the voting shares, unless such power results solely from a revocable proxy given in response to a proxy solicitation made to ten or more persons and in accordance with the Securities Exchange Act of 1934;

2. Investment power, which includes the power to dispose or to direct the disposition of the voting shares; or

3. The right to acquire voting power or investment power, whether such right is exercisable immediately or only after the passage of time, pursuant to any contract,

arrangement, or understanding, upon the exercise of conversion rights, exchange rights, warrants, or options, or otherwise; provided, that (i) a person shall not be deemed to be a beneficial owner of voting shares tendered pursuant to a tender or exchange offer made by such person or such person's affiliates or associates until such tendered voting shares are accepted for purchase or exchange, (ii) a member of a national securities exchange shall not be deemed to be a beneficial owner of shares held directly or indirectly by it on behalf of another person solely because such member is the record holder of such securities and, pursuant to the rules of such exchange may direct the vote of such shares, without instructions, on other than contested matters or matters that may affect substantially the rights or privileges of the holders of the shares to be voted but is otherwise precluded by the rules of such exchange from voting without instructions and (iii) a director of the corporation shall not be deemed to be a beneficial owner of voting shares beneficially owned by another director of the corporation solely by reason of actions undertaken by such persons in their capacity as directors of the corporation.

"*Control*" means the possession, directly or indirectly, through the ownership of voting securities, by contract, arrangement, understanding, relationship or otherwise, of the power to direct or cause the direction of the management and policies of a person. The beneficial ownership of ten percent or more of a corporation's voting shares shall be deemed to constitute control.

The "*determination date*" means the date on which an interested shareholder became an interested shareholder.

Unless otherwise specified in the articles of incorporation initially filed with the Commission, a "*disinterested director*" means as to any particular interested shareholder (i) any member of the board of directors of the corporation who was a member of the board of directors before

the later of January 1, 1988, and the determination date and, (ii) any member of the board of directors of the corporation who was recommended for election by, or was elected to fill a vacancy and received the affirmative vote of, a majority of the disinterested directors then on the board.

"*Fair market value*" means:

1. In the case of shares, the highest closing sale price of a share quoted during the thirty-day period immediately preceding the date in question on the composite tape for shares listed on the New York Stock Exchange, or, if such shares are not quoted on the composite tape on the New York Stock Exchange, on the principal United States securities exchange registered under the Securities Exchange Act of 1934 on which such shares are listed, or, if such shares are not listed on any such exchange, the highest closing bid quotation with respect to a share during the thirty-day period preceding the date in question on the National Association of Securities Dealers, Inc., automated quotations system or any similar system then in general use, or, if no such quotations are available, the fair market value of a share on the date in question as determined by a majority of the disinterested directors; and

2. In the case of property other than cash or shares, the fair market value of such property on the date in question as determined by a majority of the disinterested directors.

An "*interested shareholder*" means any person that is:

1. The beneficial owner of more than ten percent of any class of the outstanding voting shares of the corporation; however, the term "interested shareholder" shall not include the corporation or any of its subsidiaries, any savings, employee stock ownership, or other employee benefit plan of the corporation or any of its subsidiaries,

or any fiduciary with respect to any such plan when acting in such capacity. For the purpose of determining whether a person is an interested shareholder, the number of voting shares deemed to be outstanding shall include shares deemed owned by the interested shareholder through application of subdivision 3 under the definition of "beneficial owner" but shall not include any other voting shares that may be issuable pursuant to any contract, arrangement, or understanding, upon the exercise of conversion rights, exchange rights, warrants, or options, or otherwise; or

2. An affiliate or associate of the corporation and at any time within the preceding three years was an interested shareholder of such corporation.

As to any corporation, *"subsidiary"* means any other corporation of which it owns, directly or indirectly, voting shares entitling it to cast a majority of the votes entitled to be cast generally in an election of directors of such other corporation.

"Valuation date" means, if the affiliated transaction is voted upon by shareholders, the day before the date of the vote of shareholders or, if the affiliated transaction is not voted upon by shareholders, the date of the consummation of the transaction.

"Voting shares" means the outstanding shares of all classes or series of the corporation entitled to vote generally in the election of directors. (1985, c. 522; 1988, c. 442.)

§ 13.1-725.1. Affiliated transactions.—Notwithstanding any provision to the contrary contained in this chapter, except as provided in subsection B of § 13.1-727, no corporation shall engage in any affiliated transaction with any interested shareholder for a period of three years following such interested shareholder's determination date unless approved by the affirmative vote of a majority (but

not less than two) of the disinterested directors and by the affirmative vote of the holders of two-thirds of the voting shares other than shares beneficially owned by the interested shareholder. A corporation may engage in an affiliated transaction with an interested shareholder beginning three years after such interested shareholder's determination date, provided such transaction complies with the provisions of § 13.1-726. (1988, c. 442.)

§ 13.1-726. Voting requirements for affiliated transactions.—Except as provided in § 13.1-727 and notwithstanding the provisions of subsection A of § 13.1-638, in addition to any affirmative vote required by any other section of this Act or by the articles of incorporation, an affiliated transaction shall be approved by the affirmative vote of the holders of two-thirds of the voting shares other than shares beneficially owned by the interested shareholder. (1985, c. 522; 1988, c. 442.)

§ 13.1-726.1. Determination by disinterested directors.—A majority of the disinterested directors shall have the power to determine for the purposes of this article:

1. Whether a person is an interested shareholder;

2. The number of voting shares beneficially owned by any person;

3. Whether a person is an affiliate or associate of another;

4. Whether the securities to be issued or transferred by the corporation or any of its subsidiaries to any interested shareholder have an aggregate fair market value equal to or greater than five percent of the aggregate fair market value of all of the outstanding voting shares of the corporation or any of its subsidiaries as of the determination date; and

5. Whether the assets or amount of indebtedness guaranteed that may be the subject of any affiliated trans-

action constitutes more than five percent of the consolidated net worth of the corporation. (1988, c. 442.)

§ 13.1-727. Exceptions.—A. The voting requirements set forth in § 13.1-726 do not apply to a particular affiliated transaction if the conditions specified in either of the following subdivisions are met:

1. The affiliated transaction has been approved by a majority of the disinterested directors; or

2. In the affiliated transaction consideration will be paid to the holders of each class or series of voting shares and the following conditions will be met:

a. The aggregate amount of the cash and the fair market value as of the valuation date of consideration other than cash to be received per share by holders of each class or series of voting shares in such affiliated transaction is at least equal to the highest of the following:

(1) If applicable, the highest per share price, including any brokerage commissions, transfer taxes, and soliciting dealers' fees paid by the interested shareholder for any shares of such class or series acquired by it (i) within the two-year period immediately preceding the determination or (ii) in the transaction in which it became an interested shareholder, whichever is higher, plus, in either case, interest compounded annually from the earliest date on which such highest per share acquisition price was paid, being the "share acquisition date," through the date the affiliated transaction is effected at the rate for one-year United States Treasury obligations from time to time in effect, less the aggregate amount of any cash dividends paid, and the market value of any dividends paid other than in cash, per share of such class or series, since the share acquisition date, up to the amount of such interest;

(2) The fair market value per share of such class or series on the announcement date or on the determination date, whichever is higher being the "measuring date," plus,

in either case, interest compounded annually from the measuring date through the date the affiliated transaction is effected at the rate for one-year United States Treasury obligations from time to time in effect, less the aggregate amount of any cash dividends paid, and the market value of any dividends paid other than in cash, per share of such class or series, since the measuring date, up to the amount of such interest;

(3) If applicable, the price per share equal to the per share amount determined pursuant to subdivision 2a (2) of this subsection, multiplied by the ratio of (i) the highest per share price including any brokerage commissions, transfer taxes, and soliciting dealers' fees, paid by the interested shareholder for any shares of such class or series acquired by it within the two-year period immediately preceding the determination date to (ii) the fair market value per share of such class or series on the first day in such two-year period on which the interested shareholder acquired any shares of such class or series; and

(4) If applicable, the highest preferential amount, if any, per share to which the holders of such class or series are entitled in the event of any voluntary or involuntary dissolution of the corporation;

b. The consideration to be received by holders of outstanding shares shall be in cash or in the same form as the interested shareholder has previously paid for shares of the same class or series and if the interested shareholder has paid for shares with varying forms of consideration, the form of the consideration will be either cash or the form used to acquire the largest number of shares of such class or series previously acquired by the interested shareholder;

c. During such portion of the three-year period preceding the announcement date that such interested shareholder has been an interested shareholder, except as approved by a majority of the disinterested directors:

(1) There shall have been no failure to declare and pay at the regular date therefor any full periodic dividends, whether or not cumulative, on any outstanding shares of the corporation;

(2) There shall have been (i) no reduction in the annual rate of dividends paid on any class or series of voting shares, except as necessary to reflect any subdivision of the class or series, and (ii) an increase in such annual rate of dividends as necessary to reflect any reclassification, including any reverse stock split, recapitalization, reorganization, or similar transaction which has the effect of reducing the number of outstanding shares of the class or series; and

(3) Such interested shareholder shall not have become the beneficial owner of any additional voting shares except as part of the transaction which results in such interested shareholder becoming an interested shareholder;

d. During such portion of the three-year period preceding the announcement date that such interested shareholder has been an interested shareholder, except as approved by a majority of the disinterested directors, such interested shareholder shall not have received the benefit, directly or indirectly (except proportionately as a shareholder), of any loans, advances, guarantees, pledges, or other financial assistance or any tax credits or other tax advantages provided by the corporation, whether in anticipation of or in connection with such affiliated transaction or otherwise; and

e. Except as otherwise approved by a majority of the disinterested directors, a proxy or information statement describing the affiliated transaction and complying with the requirements of the Securities Exchange Act of 1934 and the rules and regulations thereunder (or any subsequent provisions replacing such Act, rules, or regulations) is mailed to holders of voting shares of the corporation at least twenty-five days before the consumption of such affiliated transaction, whether or not such proxy

or information statement is required to be mailed pursuant to such Act, rules, regulations, or subsequent provisions.

B. The provisions of this article do not apply to a particular affiliated transaction if the conditions specified in any one of the following subdivisions are met:

1. The affiliated transaction is with (i) an interested shareholder who has been an interested shareholder continuously or who would have been such but for the unilateral action of the corporation since the latest of (a) January 26, 1988, (b) the date the corporation first became subject to this article by virtue of its having 300 shareholders of record, or (c) the date such person became an interested shareholder with the prior or contemporaneous approval of a majority of the disinterested directors, (ii) any person who becomes an interested shareholder as a result of acquiring shares from a person specified in (i) of this subdivision by gift, testamentary bequest or the laws of descent and distribution or in a transaction in which consideration was not exchanged and who continues thereafter to be an interested shareholder, or who would have so continued but for the unilateral action of the corporation, (iii) a person who became an interested shareholder inadvertently or as a result of the unilateral action of the corporation and who, as soon as practicable thereafter, divested beneficial ownership of sufficient shares so that such person ceased to be an interested shareholder, and who would not, at any time within the three-year period immediately preceeding the announcement date have been an interested shareholder but for such inadvertency or the unilateral action of the corporation, or (iv) an interested shareholder whose acquisition of voting shares making such person an interested shareholder was approved by a majority of the disinterested directors prior to such shareholder's determination date.

2. The corporation does not have more than 300 shareholders of record, unless the foregoing results from action

taken by or on behalf of an interested shareholder or a transaction in which a person becomes an interested shareholder.

3. The corporation is an investment company registered under the Investment Company Act of 1940.

4. The corporation's articles of incorporation initially filed with the Commission expressly provide that the corporation shall not be governed by this article.

5. The corporation, by action of its shareholders, adopts an amendment to its articles of incorporation or bylaws expressly electing not to be governed by this article, provided that, in addition to any other vote required by law, such amendment to the articles of incorporation or bylaws shall be approved by the affirmative vote of a majority of the shares entitled to vote that are not owned by an interested shareholder. An amendment adopted pursuant to this subdivision shall not be effective until eighteen months after the date such amendment was approved by the shareholders and shall not apply to any affiliated transaction between such corporation and any person who became an interested shareholder of such corporation on or prior to the date of such amendment. A bylaw amendment adopted pursuant to this subdivision shall not be further amended by the board of directors. In the event the articles of incorporation or bylaws are subsequently amended to eliminate a prior amendment electing not to be governed by this article, such subsequent amendment shall not restrict an affiliated transaction between the corporation and any person who became an interested shareholder at a time after such prior amendment became effective and who continued to be an interested shareholder immediately before and immediately after the adoption of such subsequent amendment, provided such person thereafter remains an interested shareholder continuously, or would have so remained but for the unilateral action of the corporation. (1985, c. 522; 1988, c. 442.)

§ 13.1-727.1. Nonexclusivity.—Except as expressly provided in this article, the provisions of this article shall not limit actions that may be taken, or require the taking of any action, by the board of directors or shareholders with respect to any potential change in control of the corporation. With respect to any action or any failure to act by the board of directors, the provisions of § 13.1-690 shall apply. In determining the best interests of the corporation, a director may consider the possibility that those interests may best be served by the continued independence of the corporation. (1988, c. 442.)

§ 13.1-728.1. Definitions.—As used in this article:

"*Acquiring person,*" with respect to any issuing public corporation, means any person who has made or proposes to make a control share acquisition of shares of such issuing public corporation.

"*Beneficial ownership*" means the sole or shared power to dispose or direct the disposition of shares, or the sole or shared power to vote or direct the voting of shares, or the sole or shared power to acquire shares, including any such power which is not immediately exercisable, whether such power is direct or indirect or through any contract arrangement, understanding, relationship or otherwise. A person shall not be deemed to be a beneficial owner of shares tendered pursuant to a tender or exchange offer made by such person until the tendered shares are accepted for purchase or exchange. A person shall not be deemed to be a beneficial owner of shares as to which such person may exercise voting power solely by virtue of a revocable proxy conferring the right to vote. A member of a national securities exchange shall not be deemed to be a beneficiaal owner of shares held directly or indirectly by it on behalf of another person solely because such member is the record holder of such securities and, pursuant to the rules of such exchange, may direct the vote of such shares, without instructions, on other than

contested matters or matters that may affect substantially the rights or privileges of the holders of the shares to be voted but is otherwise precluded by the rules of such exchange from voting without instructions.

"Control share acquisition" means the direct or indirect acquisition, other than in an excepted acquisition, by any person of beneficial ownership of shares of an issuing public corporation that, except for this article, would have voting rights and would, when added to all other shares of such issuing public corporation which then have voting rights and are beneficially owned by such person, would cause such person to become entitled, immediately upon acquisition of such shares, to vote or direct the vote of shares having voting power within any of the following ranges of the votes entitled to be cast in an election of directors: (i) one-fifth or more but less than one-third of such votes; (ii) one-third or more but less than a majority of such votes; or (iii) a majority or more of such votes. If voting rights are granted pursuant to this article in respect of any such range to shares so acquired by any person, any acquisition by such person of additional shares shall not, for purposes of the preceding sentence, constitute a control share acquisition unless, as a result of such acquisition, the voting power of the shares beneficially owned by such person would be in excess of such range in respect of which voting rights had previously been granted. If this article applies to acquisitions of shares of an issuing public corporation at the time of a control share acquisition of any shares of such corporation, then shares acquired by the same person within ninety days before or after such control share acquisition and shares acquired by the same person pursuant to a plan to make a control share acquisition are deemed to have been acquired in the same control share acquisition for the purposes of this article, regardless of the applicability of this article at the time of any other acquisitions of shares during such periods or pursuant to such a plan.

"*Excepted acquisition*" means the acquisition of shares of an issuing public corporation in any of the following circumstances:

1. Before January 26, 1988;

2. Pursuant to a binding contract in effect before January 26, 1988;

3. Pursuant to the laws of wills and decedents' estates;

4. Pursuant to the satisfaction of a pledge or other security interest created in good faith and not for the purpose of circumventing this article;

5. Pursuant to a merger or plan of share exchange effected in compliance with Article 12 (§ 13.1-716 et seq.) of this chapter if the issuing public corporation is a party to the agreement of merger or plan of share exchange;

6. Pursuant to a tender or exchange offer that is made pursuant to an agreement to which the issuing public corporation is a party;

7. Directly from the issuing public corporation, or from any of its wholly owned subsidiaries, or from any corporation having beneficial ownership of shares of the issuing public corporation having at least a majority, before such transaction, of the votes entitled to be cast in the election of directors of such issuing public corporation; or

8. In good faith and not for the purpose of circumventing this chapter by or from any person (a "transferor") whose voting rights had previously been authorized by shareholders in compliance with this article, or whose previous acquisition of beneficial ownership of shares would have constituted a control share acquisition but for any of subdivisions 1 through 7 in this definition; however, any acquisition described in this subdivision 8 shall constitute a control share acquisition if as a result thereof any person acquires beneficial ownership of shares

of such issuing public corporation having voting power in the election of directors in excess of the range of votes within which the transferor was authorized by this article to exercise voting power immediately before such acquisition.

"*Interested shares*" means the shares of an issuing public corporation the voting of which in an election of directors may be exercised or directed by any of the following persons: (i) an acquiring person with respect to a control share acquisition; (ii) any officer of such issuing public corporation; or (iii) any employee of such issuing public corporation who is also a director of the corporation.

"*Issuing public corporation*" means a domestic corporation that has 300 or more shareholders.

"*Person*" means any individual, domestic corporation, foreign corporation, partnership, unincorporated association or other entity, and any associate of any such person. For this purpose, "*associate*" shall mean (i) any other person who directly or indirectly controls, or is controlled by or under common control with, any such person or who is acting or intends to act jointly or in concert with any such person in connection with the acquisition of or exercise of beneficial ownership over shares; (ii) any corporation or organization of which any such person is an officer, director or partner or as to which any such person performs a similar function; (iii) any other person having direct or indirect beneficial ownership of ten percent or more of any class of equity securities of any such person; (iv) any trust or estate in which any such person has a beneficial interest or as to which any such person serves as trustee or in a similar fiduciary capacity; and (v) any relative or spouse of any such person, or any relative of such spouse, any one of whom has the same residence as any such person. For this purpose, "*control*" shall mean the possession, direct or indirect, of the power to direct or to cause the direc-

tion of the management or policies of a person, whether through the ownership of voting securities, by contract, arrangement or understanding, or otherwise.

The "votes" entitled to be cast by any share shall, if voting group is entitled to vote for less than the total number of directors to be elected at any election, be determined by multiplying the number of votes entitled to be cast by the holder of such share by the number of directors for whom such holder is entitled to vote; however, beneficial ownership of a majority of the shares comprising any such voting group shall be deemed to entitle such beneficial owner to cast all the votes of the shares in such voting group. (1989, c. 14; 1990, c. 252.)

§ 13.1-728.2 Application.—Unless, at the time of any control share acquisition with respect to an issuing public corporation, such corporation's articles of incorporation or bylaws provide that this article does not apply to acquisitions of shares of such corporation, shares of such corporation acquired in such control share acquisition have only such voting rights as are conferred by § 13.1-728.3. Unless by midnight of the fourth day following (i) the receipt by the secretary of the corporation at the principal office of the corporation, of a notice expressly and specifically describing a proposed control share acquiistion, or (ii) in case the proposed control share acquisition is to be made by tender offer, a public announcement, the corporation's articles of incorporation or bylaws provide that this article does not apply, then the provisions of § 13.1–728.3 shall apply to shares to be acquired in such control share acquisition. (1989, c. 14; 1990, c. 252.)

§ 13.1-728.3. Voting rights.—A. Notwithstanding any contrary provision of this chapter, shares acquired in a control share acquisition have no voting rights unless voting rights are granted by resolution adopted by the shareholders of the issuing public corporation. If such a resolution is adopted, such shares shall threafter have

the voting rights they would have had in the absence of this article.

B. To be adopted under this section, the resolution shall be approved by a majority of all the votes which could be cast in a vote on the election of directors by all the outstanding shares other than interested shares. Interested shares shall not be entitled to vote on the matter, and in determining whether a quorum exists, all interested shares shall be disregarded. For the purpose of this subsection, the interested shares shall be determined as of the record date for determining the shareholders entitled to vote at the meeting.

C. If no resolution is adopted under this section in respect of shares acquired in a control share acquisition and beneficial ownership of such shares is subsequently transferred in circumstances where the transferor no longer has beneficial ownership of such shares and the transferee is not engaged in a control share acquisition, then such shares shall thereafter have the voting rights they would have had in the absence of this article. (1989, c. 14.)

§ 13.1-728.4. Control share acquisition statement.— Any acquiring person may, after any control share acquisition or before any proposed one, deliver a control share acquisition statement to the issuing public corporation, at its principal office. The control share acquisition statement shall set forth all of the following:

1. The identity of the acquiring person and each member of any group of which the person is a part for purposes of determining the shares owned or to be owned, beneficially, by the acquiring person.

2. A statement that the control share acquisition statement is given pursuant to this article.

3. The number of shares of the issuing public corporation beneficially owned by the acquiring person and each other member of the group.

4. The range of voting power under which the control share acquisition falls or would, if consummated, fall.

5. A description in reasonable detail of the terms of the control share acquisition or the proposed control share acquisition, including but not limited to:

a. The source of funds or other consideration and the material terms of the financial arrangements for the control share acquisition;

b. Any plans or proposals of the acquiring person to liquidate the issuing public corporation, to sell all or substantially all of its assets, to merge it or exchange its shares with any other person, to change the location of its principal exectuive office or a material portion of its business activities, to change materially its management or policies of employment, to alter materially its relations with suppliers or customers or the communities in which it operates, or to make any other material change in its business, corporate structure, management or personnel;

c. Any plans or proposals of the acquiring person to acquire additional shares (including additional shares within the range set forth in the statement) or to dispose of any shares; and

d. Such other information which could reasonably be expected to affect materially the decision of a shareholder with respect to granting voting rights to shares acquired or proposed to be acquired in the control share acquisition.

6. If the control share acquisition has not taken place, representations of the acquiring person, together with a statement in reasonable detail of the facts upon which they are based, that the control share acquisition, if consummated, will not be contrary to law, and that the acquiring person has the financial capacity to make the proposed control share acquisition. For this purpose, financial capacity shall only be deemed to include (i) cash and cash

equivalents in excess of normal working capital requirements and (ii) funds to be provided under legally binding commitments from financial institutions having the capability to advance such funds. If the funds to be provided under such commitments are included in the demonstration of financial capacity, the control share acquisition statement shall be accompanied by complete copies of all such commitments and a written description of all oral understandings concerning the terms and conditions of such commitments. (1989, c. 14.)

§ 13.1-728.5. Meeting of shareholders.—A. If the acquiring person so requests at the time of delivery of a control share acquisition statement and gives an undertaking to pay the corporation's expenses of a special meeting, within ten days thereafter the directors of the issuing public corporation shall call a special meeting of shareholders for the purpose of considering the voting rights to be granted the shares acquired or to be acquired in the control share acquisition.

B. Unless the acquiring person agrees in writing to another date, the special meeting of shareholders shall be held within fifty days after receipt by the issuing public corporation of the request.

C. If the acquiring person so requests in writing at the time of delivery of the control share acquisition statement, the special meeting shall not be held sooner than thirty days after receipt by the issuing public corporation of the acquiring person's statement.

D. If the acquiring person makes no request under subsection A of this section but delivers, no later than thirty days before the intended date of notice of an annual meeting of shareholders, a control share acquisition statement with respect to shares acquired in a control share acquisition, the voting rights to be granted such shares shall be considered by any such annual meeting.

E. Notwithstanding any contrary provision of this chapter, an appointment of a proxy that confers authority to vote on the granting of voting rights pursuant to this article shall be solicited separately from any offer to purchase, or from any solicitation of an offer to sell, shares of the issuing public corporation, and may not be solicited sooner than thirty days before the meeting unless otherwise agreed to in writing by the acquiring person and the issuing public corporation. No such appointment may be solicited or voted unless the appointment expressly provides that it is revocable at all times until the completion of the vote.

F. Notwithstanding subsection A of this section, the directors of the issuing public corporation may decline to call a special meeting of shareholders requested under such subsection if they determine that, at the time of such request, the acquiring person does not beneficially own shares having at least five percent of the votes entitled to be cast at an election of directors. If the directors so decline and if the control share acquisition statement accompanying such request was delivered no later than thirty days before the intended date of notice of an annual meeting of shareholders, the voting rights to be granted shares acquired or to be acquired in the control share acquisition described in the control share acquisition statement shall be considered at such annual meeting.

G. The control share acquisition statement required pursuant to subsections A, C, D and E of this section shall be delivered under and meet the requirements of § 13.1-728.4. (1989, c. 14.)

§ 13.1-728.6. Notice to shareholders.—A. If a special meeting of shareholders is required to be called pursuant to § 13.1-728.5, notice of the special meeting shall be given as promptly as reasonably practicable by the issuing public corporation to all shareholders of record as of the record date set for the meeting, whether or not entitled to vote at the meeting.

B. Notice of the special or annual shareholders meeting at which the voting rights are to be considered shall include or be accompanied by the following:

1. A copy of the control share acquisition statement delivered pursuant to this article.

2. A statement by the board of directors of the corporation, authorized by its directors, of its position or recommendation, or that it is taking no position or making no recommendation, with respect to the granting of voting rights to shares acquired in the control share acquisition or the proposed control share acquisition. (1989, c. 14.)

§ 13.1-728.7. Redemption.—A. If authorized in a corporation's articles of incorporation or bylaws before a control share acquisition has occurred, the shares acquired in such control share acquisition with respect to which no control share acquisition statement has been filed with the issuing public corporation may, at any time during the period ending sixty days after the last acquisition of such shares by the acquiring person, be redeemed by the corporation at the redemption price specified in subsection C of this section.

B. If authorized in a corporation's articles of incorporation or bylaws before a control share acquisition has occurred, shares acquired in such control share acquisition with respect to which the shareholders have failed to grant voting rights at a special meeting or, if no special meeting for such purpose has been convened, at an annual meeting may, at any time during the period ending sixty days after such meeting, be redeemed by the corporation at the redemption price specified in subsection C of this section.

C. The redemption price for shares to be redeemed under this section shall be the number of such shares multiplied by the dollar amount (rounded to the nearest cent) equal to the average per share price, including any

brokerage commissions, transfer taxes and soliciting dealer's fees, paid by the acquiring person for such shares. The corporation may rely conclusively on public announcements by, or filings with the Securities and Exchange Commission by, the acquiring person as to the prices so paid. (1989, c. 14.)

§ 13.1-728.8. Dissenters' rights.—A. Unless otherwise provided in a corporation's articles of incorporation or bylaws before a control share acquisition has occurred, in the event shares acquired in a control share acquistion are accorded full voting rights and the acquiring person has beneficial ownership of shares entitled to cast a majority of the votes which could be cast in an election of directors, all shareholders of the issuing public corporation other than the acquiring person have the right to dissent from the granting of voting rights and to demand payment of the fair value of their shares under Article 15 (§ 13.1-729 et seq.) of this chapter as though such granting of voting rights were a corporation action described in subsection A of § 13.1-730, except that the provisions of subsection C of § 13.1-730 shall not be applicable and the failure to vote in favor of the granting of voting rights shall be deemed to constitute compliance with the requirements of subsection A of § 13.1-733.

B. For the purposes of this section "fair value" shall in no event be less than the highest price per share paid in the control share acquisition, as adjusted for any subsequent share dividends or reverse share splits or similar changes. (1989, c. 14.)

§ 13.1-728.9. Nonexclusivity.—Except as expressly provided in this article, neither the provisions of this article nor their application to any acquiring person shall limit actions that may be taken, or require the taking of any action, by the board of directors or shareholders with respect to any potential changes in control of any issuing public corporation. In the case of any action taken or not

taken by directors, the provisions of § 13.1-690 shall apply, and, in determining the best interests of the corporation, a director may consider the possibility that those interests may best be served by the continued independence of the corporation. (1989, c. 14.)

APPENDIX H

GENERAL ASSEMBLY OF VIRGINIA—
1988 SESSION
HOUSE JOINT RESOLUTION NO. 139

Requesting the State Corporation Commission to study hostile corporate takeovers in Virginia.

Agreed to by the House of Delegates, February 16, 1988
Agreed to by the Senate, March 9, 1988

WHEREAS, corporations are a major contributor to Virginia's economy as they pay a significant amount of taxes, provide employment to a large number of citizens, and contribute to community projects; and

WHEREAS, in recent years increased activity in regards to hostile corporate takeovers has adversely affected corporations throughout the United States, including some in Virginia; and

WHEREAS, such activity can be highly disruptive to communities by causing, among other things, high unemployment and erosion of the economy and tax base; and

WHEREAS, several states have enacted and many more are considering legislation that will block hostile corporate takeovers that they fear will cost them jobs and revenue; and

WHEREAS, in 1985, as part of the revision of the Stock Corporation Act, Virginia enacted provisions designed to discourage certain types of transactions that involve an actual or threatened change in control of the corporation, but such provisions may need to be strengthened; and

WHEREAS, Virginia has a vital interest in protecting its citizens, corporations, and itself from the adverse effects of hostile corporate takeovers; now, therefore, be it

RESOLVED by the House of Delegates, the Senate concurring, That the State Corporation Commission is requested to study hostile corporate takeovers in Virginia. The State Corporation Commission shall focus its efforts upon, but not be limited to, a determination of the extent of the problems associated with corporate takeovers in Virginia and their impact on the Commonwealth's economy, a consideration of what other states and the federal government are doing to address the problem, and a consideration of possible legislation to protect Virginia's corporations and employees from the adverse effects of such takeovers.

Upon completion of this study the State Corporation Commission should report its findings to the Governor and the 1989 Session of the General Assembly as provided to procedures of the Division of Legislative Automated Systems for processing legislative documents.